LIBRARY
SUPREME COURT, U. S.

FILED
AUG 8 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 69

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,

Petitioners,

—v.—

JACKSONVILLE TERMINAL COMPANY,

Respondent.

BRIEF FOR PETITIONERS

LESTER P. SCHOENE
Schoene & Kramer
1625 K Street, N.W.
Washington, D. C. 20006

NEAL P. RUTLEDGE
601 Flagler Federal Bldg.
111 N.E. First Street
Miami, Florida 33132

Counsel for Petitioners

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	3
Constitutional Provisions and Statutes Involved	4
Questions Presented	5
Statement of the Case	8
A. History of the Case	8
B. Statement of the Facts	14
Summary of Argument	23
ARGUMENT:	
I. Federal Labor Law, Having Its Source in Federal Statutes, and Not State Law, Governs the Legality of Petitioners' Challenged Conduct	27
II. The Peaceful Picketing Here Involved, Addressed to Fellow Railroad Workers in the Same Industry, Is Legal Concerted Activity for the Purpose of Mutual Aid and Protection Under Controlling Federal Law	42
A. The Clayton Act and the Norris-LaGuardia Act Are Applicable to the Conduct Here Involved and Protect It	42

PAGE

B. The Peaceful Picketing Conduct Here Involved Is "Primary" and Not "Secondary" Labor Conduct Under Section 8(b)(4) of the Labor Management Relations Act's Amendments to the National Labor Relations Act 61

III. The Norris-LaGuardia Act, 29 U. S. C. §101 *et seq.*, Applies to a State Court Adjudicating, as Here, a Labor Case Controlled by Federal Law 66

IV. The Jurisdiction of the State Court in This Case Is Ousted by the Exclusive Primary Jurisdiction of The National Labor Relations Board Under *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959) 74

V. The Injunction of the Florida Court in This Case Violates Free Speech Rights Protected by the First and Fourteenth Amendments to the United States Constitution 80

CONCLUSION 85

TABLE OF AUTHORITIES

Cases:

Alabama State Federation of Labor v. McAdory, 18 So. 2d 810 (Ala. S. Ct. 1944), cert. dismissed, 325 U. S. 450 (1945) 40

Amalgamated Food Employees v. Logan Valley Plaza, —— U. S. ——, 88 S. Ct. 1601 (1968) 81, 82

PAGE

American Dredging Co. v. Local 25, 338 F. 2d 837 (3 Cir. 1964), cert. den., 380 U. S. 935 (1965) 66

American Federation of Labor v. Swing, 312 U. S. 321 (1941) 26, 83

American Steel Foundries v. Tri-City Central States Council, 257 U. S. 184 (1921) 48

Atlantic Coast Line R. Co. v. Brotherhood of R. Trainmen, 385 U. S. 20 (1966) 2, 8, 9, 14, 29

Avco Corporation v. Aero Lodge No. 735, —— U. S. ——, 376 F. 2d 337, 88 S. Ct. 1235 (1968) 66, 68

Bakery Sales Drivers' Union v. Wagshal, 333 U. S. 437 (1948) 57

Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of North America, 274 U. S. 37 (1927) 48

Bernhardt v. Polygraphic Co., 350 U. S. 198 (1956) 69

Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co., 372 U. S. 284 (1963) 29, 30, 37

Brotherhood of Locomotive Firemen & Enginemen v. Florida East Coast R. Co., 346 F. 2d 673 (5 Cir. 1965) 60, 78

Brotherhood of Locomotive Firemen & Enginemen and Brotherhood of Railroad Trainmen and Phelps Dodge Corp., 130 N. L. R. B. No. 94, 47 L. R. R. M. 1461 (1961) 79

Brotherhood of R. Trainmen v. Atlantic Coast Line R. Co., 362 F. 2d 649 (5 Cir. 1966) 3, 8, 10, 58

Brotherhood of R. Trainmen v. Hon. Roger J. Waybright, Case No. I-7 (F. D. C. 1966) 12

Brotherhood of R. Trainmen v. Jacksonville Terminal Co., Case No. 244, O. T. 1966 76

Brotherhood of R. Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50 (1944) 9, 67

PAGE

Brotherhood of Ry. Clerks v. Florida East Coast R. Co., 384 U. S. 238 (1966) 8, 30, 37

Broward County Port Authority v. Railroad Telegraphers et al., 54 L. R. R. M. 2228 (Fla. Cir. Ct. 1963) 26, 78

Broward County Port Authority and Order of Railroad Telegraphers et al., Case No. AO-64, 1963, 144 N. L. R. B. No. 115, 54 L. R. R. M. 1312 78

Brown v. Western Railway of Alabama, 338 U. S. 294 (1949) 69, 70

California v. Taylor, 353 U. S. 553 (1957) 37

Capital Service v. National Labor Relations Board, 347 U. S. 501 (1954) 28

Carpenters Local 213 v. Ritter's Cafe, 315 U. S. 722 (1942) 84

Charles Dowd Box Co. v. Courtney, 368 U. S. 502 (1962) 40, 66

Charleston & Western Carolina R. Co. v. Yarnville Furniture Co., 237 U. S. 597 (1915) 38

Chicago, B. & O. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. 481 (C. C. Ia. 1888) 43

Commonwealth of Pennsylvania v. Nelson, 350 U. S. 497 (1956) 38

Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295 (1925) 48

Cox v. Louisiana, 379 U. S. 536 (1965) 81, 82

Dice v. Akron, Canton and Youngstown R.R., 342 U. S. 359 (1952) 69

Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672 (D. C. S. D. N. Y. 1948) 64

Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921) 46, 51

PAGE

Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711 (1945) 34

FEC Ry. v. Jacksonville T. Co., Case No. 63-16, U. S. Dist. Ct. 9

Florida East Coast R. Co. v. Brotherhood of Loc. Eng., Order of Railroad Conductors & Brakemen, and Brotherhood of Locomotive Firemen and Enginemen, 362 F. 2d 482 (5 Cir. 1966) 9

Florida East Coast R. Co. v. Brotherhood of R. Trainmen, 336 F. 2d 172 (5 Cir. 1964), cert. den., 379 U. S. 990 (1965) 8, 9, 37

Florida East Coast Railway Co. v. Broward County Port Authority v. Brotherhood of Locomotive Firemen & Enginemen et al., Case No. 63-282-Civ.-DD 78

Freeman v. Bee Machine Co., 319 U. S. 448 (1943) 71

Garner v. Teamsters Union, 346 U. S. 485 (1954) 38, 71

Garrett v. Moore-McCormack Co., 317 U. S. 239 (1942) 69

Gompers v. Buck's Stove & R. Co., 221 U. S. 418 (1911) 43

Grand Jury, In Re, 62 Fed. 840 (D. C. N. D. Cal. 1894) 43

Guaranty Trust Co. v. York, 326 U. S. 99 (1945) 69

Guss v. Utah Labor Relations Board, 353 U. S. 1 (1957) 68

Hill v. Florida, 325 U. S. 538 (1945) 38

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229 (1917) 43

International Ass'n of Mach. v. Central Airlines, 372 U. S. 682 (1963) 41, 69

International Bro. of Elect. Wkrs. v. NLRB, 122 U. S. App. D. C. 8, 350 F. 2d 791 (D. C. Cir. 1965), cert. den., 383 U. S. 943 (1966) 26, 74, 75, 77

PAGE

Jacksonville Terminal Co. v. Florida East Coast Ry. Co., 363 F. 2d 216 (5 Cir. 1966), cert. den., 385 U. S. 950 (1966) 15, 29, 35, 36

Lake Valley F. Products v. Milk Wagon D. Union, 108 F. 2d 436 (7 Cir. 1939) 51

Lennon, Ex Parte, 166 U. S. 548 (1897) 43, 61

Liner v. Jafco, Inc., 375 U. S. 301 (1964) 70

Local 761, Inter. U. of E., R. & M. Wkrs. v. N. L. R. B., 366 U. S. 667 (1961) 48, 61, 62, 65

Local No. 174, Teamsters v. Lucas Flour Co., 369 U. S. 95 (1962) 40

Local No. 438 Construction & Gen. Lab. U. v. Curry, 371 U. S. 542 (1963) 70

Local Union No. 25 v. New York, New Haven and Hartford R. Co., 350 U. S. 155 (1956) 26, 74, 75, 78

Loewe v. Lawlor, 208 U. S. 274 (1908), 235 U. S. 522 (1915) 43

Marine Engineers Benevolent Ass'n v. Interlake Steamship Co., 370 U. S. 173 (1962) 26, 74, 76

Masters, Mates & Pilots and Ingram Barge Co., 136 N. L. R. B. No. 112, 49 L. R. R. M. 1943 (1962) 65

McCarroll v. Los Angeles District Council, 49 Cal. 2d 45, 315 P. 2d 322, cert. den., 355 U. S. 932 (1958) 66, 73

Meat Cutters Union v. Jewel Tea Co., 381 U. S. 676 (1965) 47, 50

Milk Wagon D. Union v. Lake Valley F. Products, 311 U. S. 91 (1940) 42, 51

Milk Wagon Drivers U. v. Meadowmoor Dairies, 312 U. S. 287 (1941) 82

Nash v. Florida Industrial Commission, 389 U. S. 235 (1967) 38 S. Ct. 362 ..... 38, 76

PAGE

N. L. R. B. v. Denver Bldg. & Construction Trades Council, 341 U. S. 675 (1951) 54
N. L. R. B. v. Electrical Workers, CIO, 228 F. 2d 553 (2 Cir. 1955), cert. den., 351 U. S. 962 (1956) 65
N. L. R. B. v. International Rice Mill Co., 341 U. S. 665 (1951) 65
N. L. R. B. v. Local 459, Electrical Workers, 289 F. 2d 62 (2 Cir. 1961) 65
National Woodwork Mfrs. Ass'n v. N. L. R. B., 386 U. S. 612 (1967) 42, 54

Pan American World Airways, Inc. v. United Bro. of Carpenters & Joiners, 324 F. 2d 217 (9 Cir. 1963), cert. den., 376 U. S. 964 (1964) 79

Railway Employes' Dept. v. Hanson, 351 U. S. 225 (1956) 37
Republic Steel Corp. v. Maddox, 379 U. S. 650 (1965) 40
Rice v. Santa Fe Elevator Corporation, 331 U. S. 218 (1947) 39, 40

San Diego Building Trades Council v. Garmon, 359 U. S. 236 (1959) 7, 25, 68, 70, 71, 74, 78
Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173 (1942) 41

Teamsters Local 24 v. Oliver, 358 U. S. 283 (1959) ..34, 38
Teamsters Union v. Morton, 377 U. S. 252 (1964) ..38, 40, 41, 61
Textile Workers Union v. Lincoln Mills of Alabama, 353 U. S. 448 (1957) 40
Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803 (C. C. S. D. Ohio 1894) 43

PAGE

Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730 (N. D. Ohio 1893) 43, 61
Truax v. Corrigan, 257 U. S. 312 (1921) 48
United Mine Workers v. Gibbs, 383 U. S. 715 (1966) 40, 67
United States v. Alger, 62 Fed. 824 (C. C. Ind. 1894) 43
United States v. Building & Construction Trades Council of New Orleans, 313 U. S. 539 (1941) 54
United States v. Cassidy, 67 Fed. 698 (D. C. N. D. Cal. 1895) 43
United States v. Debs, 64 Fed. 724, aff'd on other grounds, 158 U. S. 564 (1895) 43, 61
United States v. Elliott, 62 Fed. 801 (C. C. E. D. Mo. 1894) 43
United States v. Elliott, 64 Fed. 27 (C. C. E. D. Mo. 1894) 43
United States v. Florida East Coast R. Co., 55 LRRM 2798 (M. D. Fla. 1964) 9
United States v. Florida East Coast R. Co., 221 F. Supp. 325 (D. C. D. C. 1963) 8-9
United States v. Hutcheson, 312 U. S. 219 (1941) 24, 51-52, 53, 57
United States v. International Hod Carriers' and Common Laborers' District Council of Chicago, 313 U. S. 539 (1941) 53
United States v. Railway Employees' Department of American Federation of Labor, 283 Fed. 479 (D. C. Ill. 1922) 48
United States v. United Brotherhood of Carpenters and Joiners of America, 313 U. S. 539 (1941) 54
United States v. Workingmen's Amalgamated Council of New Orleans, 54 Fed. 994 (C. C. E. D. La. 1893), aff'd, 57 Fed. 85 (5 Cir. 1893) 43

PAGE

United Steelworkers v. N. L. R. B., 376 U. S. 492 (1964) 25, 63, 64, 65

Waterhouse v. Comer, 55 Fed. 149 (C. C. W. D. Ga. 1895) 43

Weber v. Anheuser-Busch, Inc., 348 U. S. 468 (1955) .. 38

Williams v. Jacksonville Terminal Co., 315 U. S. 386 (1942) 31

Constitutional Provisions:

United States Constitution

Article I, Section 8 (Commerce Clause) 4

Article VI, Paragraph 2 (Supremacy Clause) 4

First Amendment 4, 7, 26, 27, 62, 80, 81, 82, 83, 84

Fourteenth Amendment 4, 7, 26, 80, 81, 83, 84

Statutes:

15 U. S. C. §§15, 25 71

28 U. S. C. §1257(3) 3

28 U. S. C. §1338 71

Boiler Inspection Act, 45 U. S. C. §22 et seq. 31

Clayton Act, Sections 6 and 20, 38 Stat. 731, 738 (1914), 15 U. S. C. §17, 29 U. S. C. §52 ..... 4, 6, 31, 32, 46, 47, 53, 58, 59

Erdman Act of 1898, 30 Stat. 424 31

Fair Labor Standards Act, 29 U. S. C. §216 et seq. 31

Federal Employers Liability Act, 45 U. S. C. §51 et seq. 31

PAGE

Florida Statutes, 1965 and 1967
The Florida Transportation Act, Chapter 351, 13A F. S. A. §§351.01-351.30 ..... 5, 34
The Florida Restraint of Trade Laws, Chapter 542, 16 F. S. A. §§542.01-542.12 ..... 5, 34
The Florida Labor Relations Law, Chapter 447, 15 F. S. A. §§447.01-447.16 ..... 5, 7, 30, 80

Hours of Service of Employees Act, 45 U. S. C. §61 et seq. 31

Interstate Commerce Act of 1887, 24 Stat. 379, 49 U. S. C. §1, et seq. 42

National Labor Relations Act, Sections 2 and 8(b)(4), as amended by the Labor Management Relations Act, 61 Stat. 140 (1947), as amended, 29 U. S. C. §152 and §158(b)(4) 4, 6, 7, 26, 33, 54, 55, 61, 62, 63, 64, 74, 75, 78

Newlands Act of 1913, 38 Stat. 103 31

Norris-LaGuardia Act, 47 Stat. 70 (1932), as amended, 29 U. S. C. §101 et seq. 4, 6, 10, 31, 32, 33, 49, 66, 67
Section 13(d) 25, 70

Public Laws 88-108, 77 Stat. 129 32
Public Laws 90-10, 81 Stat. 12 32
Public Laws 90-13, 81 Stat. 13 32

Railroad Retirement Act, 45 U. S. C. §228 et seq. 31
Railroad Unemployment Insurance Act, 45 U. S. C. §351 et seq. 31
Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U. S. C. §151 et seq. 4, 5, 6, 8, 23, 30, 31, 32
Amended 1934, 48 Stat. 1186 31

PAGE

Amended 1948, 62 Stat. 909 31
Amended 1951, 64 Stat. 1238 31
Amended 1963, 77 Stat. 132 31
Amended 1966, 80 Stat. 208 31
Amended 1967, 81 Stat. 12, 13 31

Safety Appliance Act, 45 U. S. C. §1 et seq. 31
Sherman Act of 1890, 26 Stat. 209, 15 U. S. C. §1, et seq. 42

Taft-Hartley Act, Section 301, et seq. 40
Transportation Act of 1920, Title III, 41 Stat. 469 .. 31

Miscellaneous:

Aaron, Labor Injunctions in the State Courts—Part II: A Critique, 50 Va. L. Rev. 1147 (1964) 9

Baron, Access to Press—A New First Amendment Right, 80 Harv. L. R. 1641 82

Collective Bargaining Agreements and State Antitrust Immunity, 77 Yale L. J. 789 (1968) 34
48 Cong. Rec. 6415 (1912) 44
48 Cong. Rec. 6421 45
48 Cong. Rec. 6458 44
51 Cong. Rec. 9082 45
51 Cong. Rec. 9652 (1914) 45
51 Cong. Rec. 9654-9658 45
93 Cong. Rec. 4198 ..... 55, 65
95 Cong. Rec. 8709 64

Frankfurter and Greene, The Labor Injunction (1930), p. 165 48

Hill, Substance and Procedure in State FELA Actions —The Converse of the Erie Problem, 17 Ohio St. L. J. 384 (1956) 69

PAGE

H. R. 11032, 62nd Cong., 1st Sess. 44
H. R. 15657 45
H. R. 23635, 62nd Cong., 2nd Sess. 44

Jones, Railroad Wages and Labor Relations 1900-1952, p. 125 (1953) 31

New York Times, April 4, 1968, p. 30 83
New York Times, December 27, 1967, p. 20 83

The Federalist (Random House, Modern Library Ed.), pp. 295, 527 ..... 28, 72
The Federalist No. 44 (1788) 27
The Federalist No. 81 (1788) 73

Witte, The Federal Anti-Injunction Act, 16 Minn. L. Rev. 638 (1932) 49, 70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 69

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,

Petitioners,

—v.—

JACKSONVILLE TERMINAL COMPANY,

Respondent.

BRIEF FOR PETITIONERS

Petitioners, who were defendants in the Florida trial court and appellants in the Florida District Court of Appeal, First District, below are the Brotherhood of Railroad Trainmen, a labor organization, Order of Railway Conductors and Brakemen, a labor organization, Brotherhood of Locomotive Firemen and Enginemen, a labor organization, Ray Moore, an individual, Lowell Kennedy, an individual, and T. C. Bolin, an individual.

References to the unprinted record in this case will be made by the symbol "R"; references to the printed Joint Appendix containing portions of the record as stipulated to by the parties will be made by the symbol "JA"; and references to the Appendix to the Petition for a Writ of Certiorari containing the text of statutes and constitutional provisions involved, as well as the opinions of the courts below in this case and in companion cases, will be made

by the symbol "A" or the word "Appendix" (e.g., Appendix B, p. 7a, or A. 7a). All emphasis in quoted matter is supplied unless otherwise noted.

Opinions Below

The opinion and judgment of the District Court of Appeal, First District, State of Florida, dated July 18, 1967, is printed at JA 417 and Appendix B, p. 7a; appears at R. Vol. VI, p. 7; and is reported at 201 So. 2d 253. The Final Decree of the Florida Circuit Court of the Fourth Judicial Circuit, In and For Duval County, Florida, dated July 29, 1966, which was affirmed by the judgment here under review, is printed at JA 180 and Appendix A, p. 1a; appears at R. Vol. II, p. 197; and is not reported. The Order of the Supreme Court of Florida, dated November 7, 1967, dismissing an appeal from the judgment of the District Court of Appeal, First District, State of Florida, is printed at JA 419 and Appendix C, p. 9a; appears at R. Vol. VI, p. 17; and is reported at 207 So. 2d 458. The Order of the Supreme Court of Florida dated January 30, 1968, denying a Petition for a Writ of Certiorari to review the judgment of the District Court of Appeal, First District, State of Florida, is printed at JA 420 and Appendix D, p. 10a; appears at R. "Certiorari Proceedings," p. 4; and is reported at 209 So. 2d 670.

The opinions and judgments in companion cases arising out of the identical facts and conduct here involved, including the judgment of this Court in *Atlantic Coast Line R. Co.* v. *Brotherhood of R. Trainmen*, 385 U. S. 20 (1966), affirming by an equally divided Court the judgment of the United States Court of Appeals for the Fifth Circuit in

Brotherhood of R. Trainmen v. *Atlantic Coast Line R. Co.*, 362 F. 2d 649 (5 Cir. 1966), are set forth in Appendices E-I to the Petition for a Writ of Certiorari, pp. 11a-38a.

Jurisdiction

The judgment of the District Court of Appeal, First District, State of Florida, was rendered on July 18, 1967 (JA 417). Thereafter, in an effort to exhaust all possible state-court remedies, petitioners timely filed both an appeal from the judgment of the District Court of Appeal, First District, to the Florida Supreme Court and a petition for a writ of certiorari to the Florida Supreme Court seeking review of the District Court of Appeal, First District's judgment (JA 418; R. "Certiorari Case," p. 1). The Florida Supreme Court dismissed the appeal on November 7, 1967, without opinion, 207 So. 2d 458 (JA 419), and denied the petition for a writ of certiorari on January 30, 1968, 209 So. 2d 670 (JA 420).

The petition for a writ of certiorari was filed in this Court on April 29, 1968 (Case No. 1378, O. T. 1967) and was granted on June 10, 1968, —— U. S. ——, 88 S. Ct. 2060.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1257(3).

Constitutional Provisions and Statutes Involved

The following constitutional provisions and statutes are involved and, being lengthy, are set forth in the Appendix to the Petition for a Writ of Certiorari heretofore filed:

1. The Commerce Clause, Article I, Section 8, Constitution of the United States (Appendix J(1), p. 39a).

2. The Supremacy Clause, Article VI, Paragraph 2, Constitution of the United States (Appendix J(2), p. 39a).

3. The First Amendment, Constitution of the United States (Appendix J(3), p. 39a).

4. The Fourteenth Amendment, Constitution of the United States (Appendix J(4), p. 39a).

5. The Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U. S. C. §151 *et seq.* (Appendix K, pp. 40a-73a).

6. The Norris-LaGuardia Act, 47 Stat. 70 (1932), as amended, 29 U. S. C. §101 *et seq.* (Appendix L, pp. 74a-80a).

7. Sections 6 and 20 of the Clayton Act, 38 Stat. 731, 738 (1914), 15 U. S. C. §17, 29 U. S. C. §52 (Appendix M, pp. 81a-82a).

8. Sections 2 and 8(b)(4) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 61 Stat. 140 (1947), as amended, 29 U. S. C. §152 and §158(b)(4) (Appendix N, pp. 83a-87a).

9. The Florida Transportation Act, Chapter 351, Florida Statutes, 1965 and 1967, 13A F. S. A. §351.01-§351.30 (Appendix O, pp. 88a-100a).

10. The Florida Restraint of Trade Laws, Chapter 542, Florida Statutes, 1965 and 1967, 16 F. S. A. §542.01-§542.12 (Appendix P, pp. 101a-107a).

11. The Florida Labor Relations Law, Chapter 447, Florida Statutes, 1965 and 1967, 15 F. S. A. §447.01-§447.16 (Appendix Q, pp. 108a-115a).

Questions Presented

1. Where employees of an interstate railroad carrier are engaged in a lawful strike arising out of a "major dispute" under the Railway Labor Act, 45 U. S. C. §151-§163, does federal or state law govern the legality of peaceful and orderly picketing carried on by the striking employees and their unions against the operations of the struck carrier on premises of a Terminal Company which is jointly owned and controlled by the struck carrier with other interstate carriers under a joint venture agreement executed pursuant to Interstate Commerce Commission approval, which agreement grants to each carrier the equal right to the use of all Terminal Company premises in common, and on which premises the struck carrier regularly carries on its business, operates its trains, deals with the public, receives the labor services of the Terminal Company's employees, maintains its equipment, and receives and makes deliveries of goods and cars?

2. Under the circumstances set forth in Question 1, may a state court apply exclusively local state law to prohibit concerted, peaceful, orderly labor activity of the striking railroad employees and their unions without regard for the provisions of numerous federal statutes (e.g., the Railway Labor Act, 45 U. S. C. §151-§163; the Clayton Act, 15 U. S. C. §17, 29 U. S. C. §52; and the Norris-LaGuardia Act, 29 U. S. C. §101 *et seq.*) regulating interstate railway labor disputes and despite the provisions of the Commerce Clause and the Supremacy Clause of the United States Constitution to the contrary?

3. Under the circumstances set forth in Question 1, is the peaceful and orderly picketing of the striking railroad employees and their unions lawful concerted labor activity under controlling federal law?

4. Under the circumstances set forth in Question 1, do the provisions of the Norris-LaGuardia Act, 29 U. S. C. §101 *et seq.*, apply to a state court whose jurisdiction is invoked to adjudicate the legality of the peaceful and orderly picketing conducted by lawfully striking railroad employees and their unions seeking to exercise their right of "self help" in a "major dispute" arising under the Railway Labor Act, 45 U. S. C. §151 *et seq.*?

5. Under the circumstances set forth in Question 1, is the peaceful and orderly picketing the kind of labor conduct which is "arguably subject" to the jurisdiction of the National Labor Relations Board under the National Labor Relations Act, 29 U. S. C. §141 *et seq.*, where the picketing union is a "labor organization" within the literal definition of the National Labor Relations Act, 29 U. S. C. §152(5); where the conduct is challenged by the Terminal

Company as constituting an illegal secondary boycott, which is labor conduct prohibited by the National Labor Relations Act, 29 U. S. C. §158(b)(4); and where the picketing affects interstate commerce in an amount clearly exceeding the NLRB's minimal jurisdictional limits as to economic impact on interstate commerce? If so, does a state court have jurisdiction to make the initial adjudication of the legality of such challenged labor conduct under the rule of exclusive primary jurisdiction set forth in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959)?

6. Under the First and Fourteenth Amendments to the United States Constitution, may a State which does not ban all peaceful and orderly picketing on its public streets and in fact permits peaceful picketing which is not "beyond the area of the industry within which a labor dispute arises" (Section 447.09(11), Florida Statutes, 1965 and 1967, 15 F. S. A. §447.09(11)), apply a different and more restrictive rule to railroad workingmen so as to limit their right of free communication by peaceful picketing to their employer and persons directly employed by such employer, while forbidding such communication to other railroad workers engaged in the same industry, who perform labor services for the employer or who make deliveries to, or receive deliveries from, the employer?

7. Under the First and Fourteenth Amendments to the United States Constitution, may a State prohibit peaceful and orderly picketing on the public streets of a city where the picketing does not interfere in any way with the regular use of the streets for the purpose of carrying traffic and where the only effect of the picketing is to cause some of the people who see and read the message on the picket

signs to respond voluntarily to such message in an orderly fashion by refusing to cross the picket line?

Statement of the Case

A. *History of the Case*

This case is a companion case to the one decided by this Court by an equally divided vote in *Atlantic Coast Line R. Co.* v. *Brotherhood of R. Trainmen,* 385 U. S. 20 (1966), affirming *Brotherhood of R. Trainmen* v. *Atlantic Coast Line R. Co.,* 362 F. 2d 649 (5th Cir. 1966), and arises out of the identical fact situation.

The Florida East Coast Railway Company (hereinafter called FEC) has been involved in a strike with its *non-operating* employees since January, 1963 (JA 229-230, 324-328, 94-116). See *Brotherhood of Ry. Clerks* v. *Florida East Coast R. Co.,* 384 U. S. 238 (1966). During the course of this strike, which still continues, the FEC served proposals on the unions representing its *operating* employees seeking to abolish their existing collective bargaining contracts and to substitute therefor a so-called "Uniform Working Agreement" which altered rates of pay, rules, and working conditions across the board in ways deemed highly detrimental by the operating unions (JA 343, 344-345, 57). See *Florida East Coast R. Co.* v. *Brotherhood of R. Trainmen,* 336 F. 2d 172 (5 Cir. 1964), cert. den., 379 U. S. 990 (1965).

The FEC at first implemented its proposed changes without following the procedures of the Railway Labor Act, contrary to the prohibitions of Section 2, Seventh, and Section 6, of that Act, 45 U. S. C. §152, Seventh, and §156. See, e.g., *United States* v. *Florida East Coast R. Co.,*

221 F. Supp. 325 (D. C. D. C. 1963); *United States* v. *Florida East Coast R. Co.*, 55 LRRM 2798 (M. D. Fla. 1964); *Florida East Coast R. Co.* v. *Brotherhood of R. Trainmen, supra; Florida East Coast R. Co.* v. *Brotherhood of Loc. Eng., Order of Railroad Conductors & Brakemen, and Brotherhood of Locomotive Firemen and Enginemen*, 362 F. 2d 482 (5th Cir. 1966).

Eventually barred from such conduct by the decisions and injunctions in the above cases, FEC restored the previously existing contract conditions and awaited release of its proposals by the National Mediation Board under the procedures of the Railway Labor Act. The National Mediation Board released the proposals from mediation and proffered arbitration to the parties in March, 1966, which the BRT accepted (JA 344). The FEC, however, declined the proffer of arbitration (see proffer of evidence, JA 345)[1] and, thirty days later, on April 24, 1966, unilaterally implemented its proposals for the crafts of trainmen and

[1] The State Court refused to admit this evidence, stating that it was not familiar with the "intricacies" of the labor laws (JA 345), whereas the Federal Court, trying the same case, received evidence on this point (R. 141-142, Case No. 220, O. T. 1966, *ACL RR* v. *BRT*, 385 U. S. 20). Similarly, the U. S. District Court admitted (R. 159, Case No. 220, O. T. 1966, *ACL RR* v. *BRT*, 385 U. S. 20), but the Florida Circuit Court rejected, the preliminary injunction in Case No. 63-16, U. S. Dist. Ct., *FEC Ry.* v. *Jacksonville T. Co.* (Defs. Ex. No. 2 for Id., JA 36-46, 352) which is still in effect and which purports to require the Terminal Company employees (JA 45) to perform labor services for the FEC if they report to work. But see *Brotherhood of R. Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944). These differences in evidentiary rulings point up that the differences in forum are more than merely "procedural" ones, even though the identical case is involved. As the late Dean Harry Shulman used to say, in trying labor cases as an arbitrator, his concern was not that he might hear too much that was irrelevant, but that he might not hear enough that was relevant. See Aaron, *Labor Injunctions in the State Courts—Part II: A Critique*, 50 Va. L. Rev. 1147, 1156-1158 (1964).

yardmen (represented by the Brotherhood of Railroad Trainmen, or BRT), conductors (represented by the Order of Railway Conductors and Brakemen, or ORC&B) and hostlers (represented by the Brotherhood of Locomotive Firemen and Enginemen, or BLF&E). In response these three unions, petitioners here, went on strike (JA 343-345, 243, 22, 30). Ten days later, on May 4, 1966, the BRT commenced the peaceful and orderly picketing of FEC's operations on the Jacksonville Terminal Company's premises which is here involved (JA 182-183).

Within hours from the commencement of the picketing, the respondent Terminal Company and two of its four joint owners, the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company, sought and obtained a temporary restraining order from the United States District Court for the Middle District of Florida, Jacksonville Division, prohibiting petitioners from all picketing of the premises of the respondent Terminal Company except for a so-called "reserved gate" which had been labeled since 1963 for the exclusive use of FEC employees who report to work on Terminal Company premises to begin their work day (Defs. Ex. 2, JA 56-57, 351; Stipulation, JA 94-95). The U. S. District Court thereafter converted its TRO into a preliminary injunction. An appeal followed promptly to the U. S. Court of Appeals for the Fifth Circuit. Effective May 24, 1966, the U. S. Court of Appeals reversed and vacated the preliminary injunction on the ground that the U. S. District Court was barred from issuing it by the provisions of the Norris-LaGuardia Act, 29 U. S. C. §101 *et seq.* *Brotherhood of R. Trainmen* v. *Atlantic Coast Line R. Co.*, 362 F. 2d 649 (5th Cir. 1966), affirmed by an equally divided Court, 385 U. S. 20 (1966). (Defs. Ex. 3, JA 62, 351; Appendix H, pp. 18a-37a.)

At this point petitioners were free of any court restraint against resuming their challenged picketing conduct. However, on May 25, 1966, the respondent Terminal Company and its co-plaintiffs filed an "Application for an Order Staying Proceedings, etc." with this Court; and petitioners refrained from reinstating the picket lines pending consideration of that Application pursuant to oral assurance given by petitioners' counsel to the Chief Deputy Clerk of this Court. By Order dated June 6, 1966, this Court granted the Application conditioned on expedited filing of a petition for a writ of certiorari, 384 U. S. 967, and thereafter, on June 20, 1966, this Court granted certiorari and set the case for oral argument during the week of October 10, 1966. 384 U. S. 1000.

Meanwhile, on May 23, 1966, the respondent Terminal Company instituted the instant case in the Florida State trial court of general jurisdiction in Jacksonville, Florida, seeking an injunction against the identical conduct involved in the pending federal court case on the asserted basis that petitioners' conduct was in violation of the laws of Florida (Complaint for Injunction and Amended Complaint for Injunction, JA 3-17, 21-28). Petitioners promptly removed the case on May 24, 1966 to the U. S. District Court, Middle District of Florida (JA 18-19), but that Court equally promptly remanded the case to the Florida State court on May 26, 1966 (JA 20). Petitioners filed their answer in the State court on May 27, 1966, expressly asserting each and all of the federal questions here presented as defenses (JA 29-35). The case came on for hearing on the Terminal Company's application for a temporary injunction, which was granted by Order dated May 30, 1966 (JA 79-82) in terms substantially the same as those in the preliminary injunction of the U. S. District

Court in the federal case (Defs. Ex. 2, JA 56, 351), which was reinstated by Order of this Court a few days later on June 6, 1966, as described above.

On June 3, 1966, petitioners filed a Suggestion for Writ of Prohibition in the Florida District Court of Appeal, First District, *Brotherhood of R. Trainmen* v. *Hon. Roger J. Waybright,* Case No. I-7, seeking a writ of prohibition against maintenance of the Florida trial court proceedings on the ground that the labor conduct involved was "arguably subject" to the exclusive, primary jurisdiction of the National Labor Relations Board and that the trial court below therefore lacked jurisdiction to hear or adjudicate the case. The Suggestion was heard June 7, 1966, and was denied by an unreported, per curiam Order dated June 8, 1966 (Appendix E, p. 11a; R. Vol. II, p. 114). A petition for a writ of certiorari filed with this Court on June 17, 1966, to review the Order of June 8, 1966 of the Florida District Court of Appeal, First District, denying that Suggestion for Writ of Prohibition (Case No. 1426, O. T. 1965; Case No. 244, O. T. 1966), was denied by this Court on November 7, 1966. 385 U. S. 935 (Appendix F, p. 12a). The respondent Terminal Company, it should be noted, opposed the petition on the grounds, *inter alia,* that the Order of the Florida District Court of Appeal, First District, denying the Suggestion for Writ of Prohibition, was based on independent, adequate state grounds (i.e., prohibition was not a proper remedy), was essentially interlocutory rather than final, and was not clearly from the highest court of the state in which a decision could be had. See Brief in Opposition, No. 244, O. T. 1966, pp. 7-13.

Meanwhile, the Florida trial court in this case proceeded on to a final hearing in July, 1966, and rendered its Final

Decree herein (JA 180-185; Appendix A, p. 1a) dated July 29, 1966, overruling all of petitioners' defenses, including all of the federal questions raised herein, and permanently enjoining petitioners from picketing the premises of the respondent Terminal Company except at the so-called "reserved gate" set aside for use of FEC employees entering the premises on foot to begin their work day. The injunction was based solely on the application of local Florida law to the challenged conduct.

Petitioners appealed to the Florida District Court of Appeal, First District, below, seeking reversal of the Final Decree on all the grounds here asserted. The District Court of Appeal heard oral argument on March 30, 1967, and thereafter, by per curiam opinion filed July 18, 1967 (JA 417; Appendix B, p. 7a; 201 So. 2d 253), affirmed the Final Decree on the basis that the question of the trial court's jurisdiction had been determined "for all practical purposes" by the prohibition and removal proceedings in favor of the State trial court's possessing jurisdiction, and on the basis that " • • • the trial court exercised a proper authority in enjoining a violation of a valid state statute • • • ."[2]

In an effort to exhaust all possible state court remedies, petitioners filed a timely appeal from the judgment of the District Court of Appeal, First District, to the Florida Supreme Court, and simultaneously filed a timely petition for a writ of certiorari with the Florida Supreme Court seeking review of such judgment. The appeal, however, was dismissed by Order of the Florida Supreme Court

[2] Which one of several Florida statutes relied upon by the trial court was thereby referred to by the District Court of Appeal, First District, does not appear and cannot be ascertained.

dated November 7, 1967 (JA 419; Appendix C, p. 9a; 207 So. 2d 458); and the petition for certiorari was denied on January 30, 1968 (JA 420; Appendix D, p. 10a; 209 So. 2d 670).

B. *Statement of the Facts*

Since the conduct involved in this case is the identical conduct involved in *Atlantic Coast Line R. Co.* v. *Brotherhood of R. Trainmen*, 385 U. S. 20 (1966), the factual situation has already been extensively presented to this Court in the briefs and the oral argument of that case. However, in short form, and in terms of the evidence and the findings in this case, the factual situation here involved is as follows:

The Jacksonville Terminal Company is a Florida corporation which is owned and controlled by four interstate railroad carriers, the FEC, the Atlantic Coast Line R. Co., the Seaboard Air Line R. Co., and the Southern Railway System (JA 309, 287-288, 347-349, 236; Defs. Ex. 2, JA 123-165, 96). It operates a passenger and freight rail terminal facility in Jacksonville, Florida which constitutes the connecting link between the FEC and the other carriers (Defs. Ex. 2, JA 123, 125, 128-129, 151-153, 96; JA 216-217, 231, 288-289, 329-330, 340). The Terminal Company and its owners are all interstate carriers by rail certificated by the Interstate Commerce Commission and covered by the Railway Labor Act (JA 181; Defs. Ex. 1, JA 47, 48-50, 351).

Pursuant to a special joint venture agreement entered into by the four owners of the Terminal Company with the approval of the Interstate Commerce Commission (Defs. Ex. 1, JA 47, 49, 351), each of the owning railroads, including the FEC, is granted an equal right to use in common all of the passenger and freight facilities, plus labor ser-

vices, of the Terminal Company (Defs. Ex. 2, JA 123, 128-129, 143, 96; see Defs. Ex. No. A for Id., JA 36-46, 352). Likewise, the joint venture agreement contains numerous provisions which give each owning railroad, including the FEC, effective control over the Terminal Company's operations and employees by giving each railroad a veto power, for example, or by requiring unanimous consent of all for policy decisions (Defs. Ex. 2, JA 123, 137, 138, 142, 143, 150, 153, 155, 156, 96). See *Jacksonville Terminal Co.* v. *Florida East Coast Ry. Co.*, 363 F. 2d 216 (5th Cir. 1966), *cert. den.*, 385 U. S. 950 (1966), for a more extensive description of the joint venture agreement, or Operating and Guaranty Agreement as it is formally called, which was described by the Court in that case to be " * * * indeed most unusual." 363 F. 2d at 217.[3]

Exercising its rights under this joint venture agreement, the FEC daily and regularly carries on its business on the Terminal Company premises, operates its trains over Terminal Company tracks, deals with the public from Terminal Company facilities, maintains and repairs its engines and cars in Terminal Company shops, receives labor services performed for it by Terminal Company employees,[4] and receives and makes deliveries of goods and cars on and by

---

[3] In this case the U. S. Court of Appeals sustained the power of the FEC to fire the President and General Manager of the Jacksonville Terminal Company. The FEC also has the power to fire "any subordinate official of the Terminal Company" (JA 153).

[4] For example, the President and General Manager of the Jacksonville Terminal Company formally advised a union official, who had protested about his members being required to perform services for the FEC while their union was on strike against the FEC, that: "Jacksonville Terminal Company employees represented by the Order of Railroad Telegraphers are expected to perform service for the Florida East Coast Railway Company in line with their previously assigned duties * * * " (Exh. to Stipulation, JA 99).

use of Terminal Company premises and facilities (JA 281-282, 284-285, 288-290, 294, 328-330, 340-341, 346-347; Amended Complaint and Answer, JA 21, 29, 30-31; Affidavit to Complaint, JA 12-13; Exhs. to Stipulation, JA 99, 96-98, 101-102, 114-115; Defs. Exh. 2, JA 123, 96 at JA 128-129, 143; Defs. Exh. A for Id., JA 36, 351-352 at JA 45-46). Terminal Company employees are required to throw switches for FEC train movements, sell tickets for FEC's account, inspect, service, maintain and repair FEC engines and cars, operate and move FEC engines and cars from the station to the roundhouse and other facilities, communicate FEC train orders, and maintain tracks and keep records for FEC's benefit (JA 12-13, 45-46, 96-98, 99, 128-129, 143, 281-286, 288-290, 328-330). Such work involves employees in the crafts of trainmen, yardmen, switchmen, signalmen, telegraphers, clerks, hostlers, conductors, maintenance of way employees, and the shop crafts.

In short, the Terminal Company premises and facilities, *and the labor of Terminal Company employees,* are an integral and essential part of FEC's daily and regular operations. Thirty per cent of all interchange handled by the Terminal Company is FEC interchange (JA 346-347). As stated by the U. S. Court of Appeals for the Fifth Circuit in the companion federal court case (Appendix H, pp. 19a-20a; 361 F. 2d at 651):

> "• • • However, despite the legal separateness of the Terminal Company's entity and operation, it cannot be disputed that the facilities and services provided by the Terminal Company *in fact* constitute an integral part of the day-to-day operations of the FEC, which continues to operate both passenger and freight trains by means of its own striker replacement crews." (Emphasis in original.)

On May 4, 1966, after going on strike against the FEC, the Brotherhood of Railroad Trainmen (BRT) began picketing the various foot, road, and rail entrances to the Jacksonville Terminal Company premises which were used either by FEC employees, or by Terminal Company employees who were under orders to perform labor services for the FEC, or by employees of connecting carriers to make deliveries to, or take deliveries from, the struck FEC. The picket signs were addressed only to "Fellow Railroad Men," advised them that the B. of R. T. was on legal strike against the FEC, and requested them not to cross or assist the FEC, and to "please make common cause with us in major dispute against FEC." (See Pl's Exhs. 2-20, R. Vols. I & VII, pp. 77-95; JA 64-69, 225.)

The locations of the pickets around the perimeter of the Terminal Company are shown on the two maps introduced into evidence (Pl's Exh. 1, JA 63, 199, and Pl's Exh. 23, JA 75, 301). All of the points picketed were places where Terminal Company employees, who are under instruction to work for the FEC (JA 99, 96-98, 101-102, 107-108, 115, 45-46), report to work except for the pickets at McQuade Street, Stockton and Acorn Streets, and perhaps Dennis Street (JA 314-316, 301-306).[5]

As for McQuade Street, this is the closest point on public property to the place where interchange between FEC and the Atlantic Coast Line Railroad takes place, as shown by Pl's Exh. 1 (JA 63, 199) and Pl's Exh. 23 (JA 75, 301). (See also JA 317, 304, 340-341.) FEC engines and trains cross McQuade Street regularly and daily in order to make

[5] In addition, of course, the so-called FEC reserved gate located on the corner of Bay and Stuart Streets was picketed (Pl's Exh. 13, JA 66-67, 225).

deliveries to, and to receive deliveries from, the ACL Railroad (JA 317, 340-341).

As for Stockton and Acorn Streets, examination of Pl's Exh. 1 (JA 63, 199) and Pl's Exh. 23 (JA 75, 301) shows that these are the closest public points to the approaches to Honeymoon and YH Yards, where all Seaboard Air Line Railroad—FEC interchange takes place (JA 216-217, 224, 233-234, 235, 304, 316-317). These are the only points open to the public without trespassing (JA 224, 233-234, 317) where an appeal can be made to SAL Railroad employees, who are approaching the place where they regularly do business with the FEC, that they not make deliveries to, or take deliveries from, the FEC.

In regard to Dennis Street, the evidence shows that the pickets did *not* cut the ACL Railroad tracks at that point (JA 316, 303-304; see Pl's Exh. 7, R. Vols. I & VII, p. 82, admitted JA 225). Instead, the pickets were located on an adjacent dirt road which serves as an entrance to the Honeymoon Yard office (where FEC-SAL RR interchange takes place, JA 216, 304, 316) and to the Terminal Company's crosstie storage yard (JA 304, 316).

In summary, each of the 35 pickets (Pl's Exh. 23, JA 75, 301)—spread out over a perimeter of two and one-half miles (JA 323)—was so stationed as to appeal to a fellow railroad worker who would either be performing work for the FEC (i.e., FEC and Terminal Company employees), or doing business with the FEC at the FEC's regular place of business (i.e., employees of connecting carriers approaching yards designated for interchange with FEC). The picketing was conducted entirely on public property and as close as possible without trespassing to the physical

locations where work was being regularly performed for the FEC or deliveries were being regularly made to or from the FEC, that is, as close as possible to the place where actual, necessary operations of the FEC were being conducted on a day-to-day basis.

The picketing was entirely peaceful and orderly and did not physically disrupt or interfere with traffic of any sort. Paragraph 8 of the Final Decree expressly states: "The decision of this Court is not made upon the basis of violence. There is no evidence in the record of any violence or threat of violence involved in the picketing" (JA 183). There were no masses of pickets congregated in any one location (JA 229). The Terminal Company's operations, while slowed down, were not halted; it continued to function and to move trains by using supervisory personnel (JA 307-308, 318-319, 241, 265, 283, 286, 293). There was no abusive language or untoward incident of any kind (JA 226-227, 274, 341, 356).

The picketing continued for only a few hours, whereupon it was restrained by the federal court TRO (Defs. Exh. 2, JA 56, 351 at 57). The very brevity of the period, of course, prevented adjustments being made to minimize the effect of the picketing on non-FEC-involved movements, although the BRT expressed a willingness to pull the picket lines down as to movements not involving FEC if so informed by supervisors (JA 264), a procedure that SAL Railroad supervisors admitted was entirely feasible (JA 237, 242). The fact that the BRT pickets did not cut the ACL Railroad's tracks at Dennis Street (JA 316, 303-304) also illustrates that the picketing was addressed solely to FEC-related operations, as the picket signs clearly stated.

As to the status of petitioner labor organizations, it was shown by stipulation that while each is predominantly composed of railroad employees employed by carriers subject to the Railway Labor Act, each also does represent some non-railroad employees of employers not subject to the Railway Labor Act. For example, the BRT represents bus drivers and approximately 7% of its members and persons represented by it are employees of employers not covered by the Railway Labor Act (Stipulation, JA 93-96; Defs. Exh. 1, BRT Constitution, JA 120-122, 96).

The effect of the picketing on interstate commerce was found by the trial court to constitute an "economic strangulation of the entire state" (Final Decree, JA 183). Be that as it may, the picketing clearly affected commerce in an amount well in excess of the jurisdictional standards of the National Labor Relations Board (Stipulation, JA 225-226; JA 11-17, 197-215, 238-243, 281, 295-306).

In regard to the "reserved gate" which the Terminal Company had posted in 1963 for the exclusive use of FEC employees who report to work on Terminal Company premises to begin their work day, the parties stipulated that its posted restrictions had not uniformly been honored and that the Terminal Company had not policed its enforcement (Stipulation, JA 94-95; JA 323-324). Admittedly, FEC employees sometimes use other entrances and non-FEC employees use the FEC gate (JA 94-95, 323-324); in fact, the Terminal Company's general manager could not recall ever seeing an FEC employee use the FEC posted gate (JA 323-324).

Only the BRT actually picketed the Terminal Company's premises; and BRT's deputy president, defendant Ray Moore, stated without equivocation that he was responsible

for, and in charge of, the conduct here involved (JA 244-245, 216, 224, 330). He stated further that he had no power to direct or to issue orders to any other railroad organization (JA 261). All of the pickets and picket captains were BRT members, or FEC strikers working in BRT crafts (Interrogatories #1-#4 and Answers, JA 83, 168-172).

There is no evidence in the record whatsoever that the defendant Brotherhood of Locomotive Firemen and Enginemen had anything whatsoever to do with the picketing. It is true that its initials, "BLF&E," were originally printed on the picket signs, which were prepared by a commercial printer in Jacksonville and were paid for by the BRT (JA 84, 178); but such initials were taped over before use by the BRT pickets (JA 251, 216, 224, 330). No BLF&E member or official was identified as attending any meeting prior to the picketing or as having anything to do with the picketing. In fact, no BLF&E member or official is anywhere identified in the record (see JA 166-167). In short, there is a total absence of any evidence that the BLF&E had participated in, authorized, or ratified the picketing or had ever threatened to picket the Terminal Company.

Likewise, as to the individual defendants, Lowell Kennedy and T. C. Bolin,* the record is totally devoid of any evidence as to who they are or what connection, if any, they had with the challenged picketing, except that defendant Bolin is identified as a representative of the Order of Railroad Conductors and Brakemen (JA 85, 173, 246) who attended informational meetings on April 24, 1966 and

---

*Defendant T. C. Bolin was originally sued as "T. C. Boland" (JA 3), but the spelling of his name was later corrected by motion and court order (JA 166-167). His name also appears misspelled in the Joint Appendix (JA 173) as "T. C. Dolan".

May 3, 1966 at which the BRT disclosed its picketing plans to other union representatives (JA 245-247, 253-259, 353, 365-373).

In regard to the Order of Railroad Conductors and Brakemen, the only evidence of its connection with the picketing is that its initials, "ORC&B", were also originally printed on the picket signs by the Jacksonville printer and then taped over by the BRT pickets, and that its representative, T. C. Bolin, attended the informational meetings on April 24, 1966 and May 3, 1966 at which the BRT announced its plans to picket the FEC's operations on the Terminal Company's premises (JA 85, 173, 246, 253).

Nevertheless, all of the non-BRT defendants named above, petitioners here, were included in the Final Decree as having "participated in active concert with the defendant Ray Moore" and as having "announced their intention to cause such picketing and patrolling of the premises of the plaintiff to be renewed unless this injunction issue, or unless the defendants are otherwise enjoined"[7] (JA 182-183).

[7] In making his oral ruling on the motion for a temporary injunction, the trial Judge stated that he was not "naive enough to ignore the fact labor organizations are by and large engaged in making common cause with one another" (JA 412).

Summary of Argument

Federal law, having its source in federal labor statutes, and not Florida law, governs the legality of petitioners' challenged conduct. This case illustrates the problems that arise when a federal and a state court each attempts to apply simultaneously its law as controlling the identical conduct.

Here, all parties are interstate railroads, their employees, and their employees' unions. All are covered by the Railway Labor Act, 45 U. S. C. §151 *et seq.* Petitioner BRT, exercising its right of "self-help" under the Railway Labor Act, candidly sought to picket and thereby halt FEC's regular and essential operations on the premises of respondent Terminal Company which FEC owns under a joint venture agreement with three other interstate railroads giving each the right to use all the facilities and labor of the Terminal Company in common and giving each substantial control over the Terminal Company's operations. The question of whether such picketing, when carried on peacefully and in an orderly manner, is lawful, is one which must be answered in terms of federal and not state law. The federal interest and scheme of regulation in the area of interstate railway labor relations is pervasive, dominant, and all-encompassing. A multitude of federal laws cover the field and have covered it since 1888. The underlying purpose of the current federal legislation and national policy is to balance competing economic interests in order to eliminate the sources of industrial strife. This purpose would be frustrated if the labor policies of 50 different states could be applied to determine the self-help rights of

parties to Railway Labor Act disputes. Congress has taken the particular subject matter here involved in hand, and Florida is therefore not free to outlaw conduct designed by federal law to be legal, any more than Florida could make lawful conduct prohibited by federal law.

There is no "gap" in federal law covering petitioners' challenged conduct. Picketing of railroad operations and railroad interchange has been covered by federal law since 1887. At first federal law prohibited almost all concerted labor conduct in the interstate railroad industry as being in violation of either the Interstate Commerce Act or the Sherman Act. However, Congress specifically changed federal law on the subject in the Clayton Act of 1914, the Railway Labor Act of 1926, and the Norris-LaGuardia Act of 1932. These statutes clearly reveal an intent by Congress to legalize peaceful, concerted labor conduct of the type here involved. *United States* v. *Hutcheson*, 312 U. S. 219 (1941).

It is true that in 1947 Congress in the Labor Management Relations Act (Taft-Hartley) reimposed certain restrictions on certain types of concerted labor conduct loosely known as "secondary boycotts." But Congress deliberately and knowingly did not include railroad employees and their unions in such restrictions. And in any event, the conduct here involved is not in violation of the LMRA restrictions because it is conducted as closely as possible, without trespassing, to the place where FEC, a primary disputant, actually and regularly operates and receives the labor services of railroad employees. The picketing was addressed solely to fellow railroad workers who either (1) perform essential labor services for FEC, or (2) regu-

larly make deliveries to, and receive deliveries from FEC at FEC's regular place of business. Under *United Steelworkers* v. *N. L. R. B.*, 376 U. S. 492 (1964), such picketing is primary and protected labor conduct under the L. M. R. A. Moreover, the Terminal Company, being owned and controlled by FEC under a joint venture agreement whereby it provides essential labor services to FEC, is clearly an "ally" of FEC; it therefore stands in the shoes of a primary disputant.

The Norris-LaGuardia Act here applies even though this is a state court case. The case is one controlled by federal law, and the provisions of Norris-LaGuardia are substantive and must be applied in such a case regardless of forum. This is the only way to obtain uniform application of federal labor law throughout the country, which is essential to effectuate national labor policy. Even procedural matters that form an ingredient of a federal scheme of regulation and cut into federally protected substantive rights must be applied by a state court adjudicating a case controlled by federal law. This interpretation does no violence to the literal language of Norris-LaGuardia and, in fact, is demanded by it. A state court trying a labor dispute case controlled by federal law is a court whose jurisdiction may be conferred, defined or limited by Act of Congress. Section 13(d) of Norris-LaGuardia and the Supremacy Clause of the United States Constitution make a state court in such circumstances a "court of the United States."

The state trial court below lacked jurisdiction to adjudicate this case under the rule of NLRB exclusive, primary jurisdiction set forth in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959). Petitioners are here alleged to be subjecting a railroad, the Terminal Com-

pany, to an illegal secondary boycott. A railroad can invoke the jurisdiction and protection of the NLRB. *Local Union No. 25* v. *New York, New Haven and Hartford R. Co.*, 350 U. S. 155 (1956). Clearly the conduct challenged is conduct arguably covered by §8(b)(4) of the L. M. R. A. Likewise, petitioners are literally within the definition of "labor organizations" under the L. M. R. A. since they do not exclusively represent railroad workers but also represent some employees covered by the L. M. R. A. Hence, it is arguable that the NLRB has jurisdiction here, and therefore the Florida state courts below lacked jurisdiction to try this case. The decision of the court below conflicts in this regard with *M. E. B. A.* v. *Interlake Steamship Co.*, 370 U. S. 173 (1962); *I. B. E. W.* v. *N. L. R. B.*, 122 U. S. App. D. C. 8, 350 F. 2d 791 (D. C. Cir. 1965), *cert. den.*, 383 U. S. 943 (1966); and *Broward County Port Authority* v. *Railroad Telegraphers*, 54 L. R. R. M. 2228 (Fla. Cir. Ct. 1963).

Finally, the injunction in this case clearly violates rights protected by the First and Fourteenth Amendments, U. S. Constitution. The injunction is a patent attempt to cut off communication between striking railroad employees and their fellow railroad workers who provide labor or delivery services to FEC. It attempts to limit speech and communication by the strikers to their employer only or those directly employed by it. As such, the injunction is clearly in regulation of speech and communication, as respondent has candidly admitted in the District Court of Appeal below. The injunction thereby violates the First and Fourteenth Amendments. *American Federation of Labor* v. *Swing*, 312 U. S. 321 (1941).

ARGUMENT

I.

Federal Labor Law, Having Its Source in Federal Statutes, and Not State Law, Governs the Legality of Petitioners' Challenged Conduct.

The Supremacy Clause of the United States Constitution provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby,* any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Speaking of this provision in *The Federalist* No. 44 (1788), James Madison succinctly underscored its keystone position in our federal scheme:

> "The indiscreet zeal of the adversaries to the Constitution has betrayed them into an attack on this part of it also, without which it would have been evidently and radically defective. To be fully sensible of this, we need only suppose for a moment that the supremacy of the State constitutions had been left complete by a saving clause in their favor.
>
> "• • •
>
> "In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it

> would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members." *The Federalist* (Random House, Modern Library Ed.), pp. 295-296.

Petitioners respectfully submit that this case, so far, is a classic illustration of the "monster" referred to by Mr. Madison—of the confusion, the delay, and the unseemly competition between state and federal courts when each attempts simultaneously to apply its law as controlling the identical conduct. Thus, while litigation was raging in the federal court system over the enjoinability of the very labor conduct here involved—with a federal court injunction that regulated such conduct being imposed, vacated, reimposed, and finally vacated again—the Florida state courts in this case were proceeding at the same time to regulate the identical conduct by application of purely Florida law through injunctions against the identical parties bound by the federal court orders. The opportunity for havoc in such circumstances is plain. See *Capital Service* v. *National Labor Relations Board*, 347 U. S. 501 (1954).

The present case arises not simply because of the "peculiar geographic position of the Jacksonville Terminal" as characterized by respondent,[8] but because of the integration of the operations, the ownership, and the control of the Terminal Company with those of the struck carrier, FEC. Integrated ownership and control is embodied in the Operating and Guaranty Agreement (JA 123-163), which provides a practical means for investing absolute control over all aspects of the Terminal Company's business and

[8] Brief of Respondent in Opposition, p. 13.

operations in each of the joint venturers, including FEC. See *Jacksonville Terminal Co.* v. *Florida East Coast Ry. Co.*, 363 F. 2d 216 (5 Cir. 1966), *cert. den.*, 385 U. S. 950 (1966).

Interchange with connecting carriers is accomplished by FEC on the Terminal Company property. Vital services for FEC trains are performed constantly on the Terminal Company premises. Respondent has previously conceded, as it must, that the Terminal Company is a "common situs" for FEC's and its co-adventurers' operations.[9] Exercising its right of "self-help" under the Railway Labor Act, petitioner BRT candidly sought to halt these FEC operations by the peaceful and orderly picketing here involved. See *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U. S. 284 (1963).

The question is whether these critical parts of FEC's operations—indeed, the most important ones of all—are immunized from peaceful labor protest by virtue of the FEC's joint venture agreement. In other words, may railroads by pooling their most vital functions, thereby exempt them from all "self-help" labor conduct and operate behind the protection of a cordon sanitaire?

The Florida courts below answered this question solely on the basis of Florida common law and the application of Florida statutes regulating commercial and business activity.[10] While expressly finding and acknowledging the

---

[9] Brief for Petitioners, p. 56, n. 5, Case No. 220, O. T. 1966, *Atlantic Coast Line R. Co.* v. *Brotherhood of R. Trainmen*, 385 U. S. 20 (1966).

[10] The State courts below did not rely on the specific Florida statute regulating labor conduct for the obvious reason that the

fact that all parties involved are subject to the Railway Labor Act, 45 U. S. C. 151 *et seq.* (Final Decree, JA 181-182), and by implication, of course, all other relevant federal legislation, the trial Court below chose to ignore the effect of such legislation and to enter its injunction based entirely upon Florida law. It is of critical importance to note that the Court made no attempt, and indeed refused, to determine the legality of BRT's conduct under federal law, or even to discuss the possible relationship of federal law to the state statutes and common law it applied.

There can be no doubt that the present case raises serious question of federal labor law concerning the substantive content of the "self-help" right available to employees of a carrier after the exhaustion of statutory procedures in a "major dispute" under the Railway Labor Act. See *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co., supra; Brotherhood of Ry. Clerks* v. *Florida East Coast R. Co.*, 384 U. S. 238 (1966). Petitioners submit there can also be no doubt whatever that the question of legality is one solely of federal law, for this area is, and must be, completely occupied by federal law and policy.

It is difficult to imagine a field in which federal interest and regulation is more pervasive and all-encompassing than that of the operations and the labor relations of interstate

---

Florida legislature, in passing the statute, expressly recognized the preemption of federal regulation in railway labor matters. See the Florida Labor Relations Law, Chapter 447, Fla. Stat., 1967, 15 F. S. A. 447.01-447.16 (Appendix Q, pp. 108a-115a), and Section 447.15 thereof (Appendix Q, p. 115a):

> "447.15 Federal regulations recognized.—All railway labor organizations and members thereof shall be exempt from all of the provisions of this chapter as long as they are regulated by act of Congress."

carriers by rail.[11] Perhaps no other subject of regulation has come before the Congress so repeatedly and so persistently over so long a period as railway labor relations. The first legislation, providing for voluntary arbitration and public investigations, was passed in 1888, 25 Stat. 501. Since then, Congress has applied its attention to the problem repeatedly—in the Erdman Act of 1898, 30 Stat. 424; the Newlands Act of 1913, 38 Stat. 103; the Clayton Act of 1914, 38 Stat. 738; Title III of the Transportation Act of 1920, 41 Stat. 469; the Norris LaGuardia Act of 1932, 47 Stat. 70; and the Railway Labor Act of 1926, 44 Stat. 577, thereafter amended in 1934, 48 Stat. 1186, in 1948, 62 Stat. 909, in 1951, 64 Stat. 1238, in 1963, 77 Stat. 132, in 1966, 80 Stat. 208, and in 1967, 81 Stat. 12, 13. Hardly a decade has elapsed without Congressional attention to the field of railway labor relations.

This history of federal regulation of railway labor relations has included a number of extraordinary chapters, as where the President of the United States seized the Nation's railroads on the eve of nationwide strikes in 1943, 1946, 1948 and 1950.[12] And the Congress of the United States has twice in the 1960's passed extraordinary legis-

---

[11] Federal laws applicable to rail carriers and their employees include the *Railway Labor Act*, 45 U. S. C. §151 *et seq.*; the *Clayton Act*, 15 U. S. C. §17, 29 U. S. C. §52; the *Norris LaGuardia Act*, 29 U. S. C. §101 *et seq.*; the *Federal Employers Liability Act*, 45 U. S. C. §51 *et seq.*; the *Railroad Retirement Act*, 45 U. S. C. §228 *et seq.*; the *Railroad Unemployment Insurance Act*, 45 U. S. C. §351 *et seq.*; the *Fair Labor Standards Act*, 29 U. S. C. §216 *et seq.*; the *Safety Appliance Act*, 45 U. S. C. §1 *et seq.*; the *Boiler Inspection Act*, 45 U. S. C. §22 *et seq.*; the *Hours of Service of Employees Act*, 45 U. S. C. §61 *et seq.* See *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386 (1942).

[12] See Jones, *Railroad Wages and Labor Relations 1900-1952*, pp. 125, 133, 140, 149 (1953).

lation to regulate rail labor relations. The first in 1963 provided for unprecedented compulsory arbitration, P. L. 88-108, 77 Stat. 129, to settle prospectively certain working conditions in the railroad industry over which labor and management were still in dispute after exhaustion of the normal procedures of the Railway Labor Act. The second in 1967 provided a special extension of the statutory time for "cooling off" prior to a strike. P. L. 90-10, and P. L. 90-13, 81 Stat. 12, 13.

Can it be seriously contended that this comprehensive regulatory scheme for railway labor relations, developed pragmatically by Congress over the years—with numerous adjustments and revisions—allows for interference by fifty different state notions of proper labor policy? We submit that it cannot. And respondent can only urge such a contention by taking a 19th Century, laissez-faire approach to the question.

Three great federal statutes of this Century govern the scope of permissible concerted activity by the employees of interstate railroads. These are Sections 6 and 20 of the Clayton Act, 15 U. S. C. §17, 29 U. S. C. §52 (Appendix M, pp. 81a-82a); the Norris-LaGuardia Act, 29 U. S. C. §101 *et seq.* (Appendix L, pp. 74a-80a); and the Railway Labor Act, 45 U. S. C. §151 *et seq.* (Appendix K, pp. 40a-73a). In all of the many rounds of the present controversy respondent has never addressed itself to the fact that all three of these statutes are here applicable. Rather respondent would have it that Congress, although vitally concerned about the labor relations of interstate carriers up to the point where "self-help" becomes available, thereupon inexplicably loses interest and abdicates its responsibility to the States to determine the legal consequences of "self-

help" activity. In short, respondent contends that there is a "statutory gap" in the scheme of federal regulation.

This "statutory gap" theory of federal railway labor legislation has been urged by respondent throughout this controversy with something akin to the enthusiasm of a French pastry chef approaching an incomplete eclair. In this case's prior appearance before this Court, respondent suggested that the eclair be filled with the Interstate Commerce Act, Section 8(b)(4) of the National Labor Relations Act, and perhaps a touch of the Sherman Act. Respondent now proposes to fill it with state law. But as in the kitchen, too many cooks will surely spoil the end result.

The Congress of the United States has legislated the economic balance to be applied between labor and management in the railroad industry and has left no "gap" in its scheme for application of varying state laws, which could only frustrate the underlying purpose of the federal regulation. As Congress has stated it (e.g., Section 2 of the Norris-LaGuardia Act, 29 U. S. C. §102, Appendix L, pp. 74a-75a), the public policy of the United States is to balance the fiercely competing interests of labor and management in order to eliminate the sources of industrial strife and to promote the free flow of commerce. And in striking this balance, Congress has declared that labor must have "full freedom" in self-organization "or in other concerted activity for the purpose of • • • mutual aid or protection; • • • ." But such a balance, once struck by Congress, must certainly fail to achieve its purpose if constantly thrown out of kilter by the application of fifty different state notions of proper labor policy.

Federal interest can be no greater than it is in the regulation of the labor relations of the direct instrumentalities

of interstate commerce. The Clayton Act, the Railway Labor Act, and the Norris-LaGuardia Act have evolved over half a century to govern the railroad world, which was aptly described by Mr. Justice Frankfurter as "• • • a state within a state" whose industrial relations "• • • are largely a thing apart." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 751 (1945) (Frankfurter, J., dissenting). Yet the Court below has entered its injunction based not at all upon the federal law specifically designed for this separate world, but rather upon state law—and not even upon state *labor* law (except for one reference to "economic pressure in the nature of a secondary boycott") (JA 184).

Any strike, picketing, or work stoppage for any reason in the railroad industry would violate most, if not all, of the numerous state business regulatory provisions cited by the Court below in support of its injunction, if they were applicable. Even the most carefully confined picketing, of the narrowest possible scope, of a railroad—if successful or effective—would cause that railroad to "violate its duties and obligations as a "carrier" (JA 184) under the Florida Transportation Act, Chapter 351, Fla. Stats. 1967, 13A F. S. A. §351.01 *et seq.* (Appendix O, pp. 80a-100a), and to "carry out restrictions in trade or commerce, or • • • in the full and free pursuit of any business" in violation of the Florida Restraint of Trade Laws, Chapter 542, Fla. Stats. 1967, 16 F. S. A. §542.01 *et seq.* (Appendix P, pp. 101a-107a). In short, such local statutes, if they apply at all, are hardly delicate tools to adjust a finely tuned federal balance, but are rather bludgeons that demolish the very scales themselves. Compare *Teamsters Local 24* v. *Oliver*, 358 U. S. 283 (1959); see *Collective Bargaining Agreements and State Antitrust Immunity*, 77 Yale L. J. 789 (1968).

Perhaps the most striking anomaly resulting from the decision here rendered by the Florida courts arises from its flat conflict with the decision of the U. S. Court of Appeals for the Fifth Circuit in *Jacksonville Terminal Co.* v. *Florida East Coast R. Co.*, 363 F. 2d 216 (5 Cir. 1966), *cert. den.*, 385 U. S. 950 (1966), where it was held that the FEC had the right to fire the President and General Manager of the Terminal Company despite the fact that a majority of the Terminal Company's board of directors refused to acquiesce in such action. The Terminal Company there contended, without success, that Florida law controlled its internal operations, and permitted its President to remain in office until a successor was duly appointed and qualified. Rejecting this contention, the Court of Appeals said:

> ". . . The whole attack rests, therefore, on application of Florida law.
>
> "This attack has no merit. We would have, first, a great deal of doubt that the Florida holdover doctrine would ever serve to continue in office one who has legally been discharged. But we think that on matters having such direct relationship to the effective operation of an important instrumentality of interstate commerce, federal, not state, standards must control. *International Ass'n of Machinists, etc.* v. *Central Airlines, Inc.*, 1963, 372 U. S. 682, 83 S. Ct. 956, 10 L. Ed. 2d 67; *Textile Workers Union of America* v. *Lincoln Mills*, 1957, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972. The fact that the physical activities of the Terminal Company may all be localized within Florida is of little consequence since it is an essential link in movements of equipment and freight to and from distant

points on this web of interstate rails. Nor is there any difficulty from an absence of any formalized body of federal law. With judicial inventiveness and resourcefulness the Federal Courts are quite adequate for the task of fashioning an appropriate set of standards. *Textile Workers Union of America* v. *Lincoln Mills, supra,* 353 U. S. at 456-457, 77 S. Ct. at 917-918, 1 L. Ed. 2d at 980-981. Indeed, for one of these very carriers, there is fresh evidence of the capacity and obligation of the Courts to prescribe judicial standards to effectuate the overriding policies of Congress. See *Brotherhood of Ry. & S.S. Clerks* v. *Florida East Coast Ry.,* 1966, 384 U. S. 238, 86 S. Ct. 1420, 16 L. Ed. 2d 501 affirming *United States* v. *Florida East Coast Ry.,* 5 Cir., 1965, 348 F. 2d 682, which followed this Court's earlier action in *Florida East Coast Ry.* v. *Brotherhood of R.R. Trainmen,* 5 Cir., 1964, 336 F. 2d 172, cert. denied 1965, 379 U. S. 990, 85 S. Ct. 703, 13 L. Ed. 2d 611." 363 F. 2d at 219-220.

Numerous considerations weigh against a Florida state court's applying state business law to interstate railway labor questions as was done by the courts below in this case.

First, the Railway Labor Act itself is a much more comprehensive statute than even the National Labor Relations Act, and is designed to effectuate continuing labor peace in the rail and air transportation industries. Far more stringent requirements and procedures relating to collective bargaining and the settlement of grievances are contained in the RLA than in the NLRA. But the entire scheme relating to "major disputes," i.e., disputes over rates of pay, rules, or working conditions, rests upon the ultimate sanction of

"self-help," which is available to both parties if agreement cannot be reached. *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co., supra.* And the permissible scope of this right to self-help (absent violence or interference with a State's prime responsibility to maintain peace and order) is clearly a matter of *federal* law.

In *Brotherhood of R. Clerks* v. *Florida East Coast Ry. Co.*, 384 U. S. 238 (1966), the scope of railroad management's right to self-help, as distinguished from railroad labor's, was involved and determined by *federal* law. See also, *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen*, 336 F. 2d 172 (5 Cir. 1964), *cert. den.*, 379 U. S. 990 (1965). Certainly if railroad management's rights to self-help under the Railway Labor Act are governed and controlled by *federal* law, it cannot be seriously contended that the rights of railroad labor to self-help are governed and controlled by *state* law. To say that the right of self-help in the interstate railroad industry varies, expands, and contracts according to the laws of fifty different states, so that the very right to strike itself may be banned in one jurisdiction while unrestrained labor conduct is allowed in another, is merely to illustrate the practical, commonsense impossibility of the view that state law applies and controls.

In *California* v. *Taylor*, 353 U. S. 552 (1957), it was held that California state law prohibiting collective bargaining by railroad workers with the State as their employer, and forbidding strikes by State employees, was preempted and superseded by federal law. Likewise, in *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225 (1956), a Nebraska state law governing union contracts was held inapplicable to railroad union contracts covered by the

Railway Labor Act. These cases point the way to decision here.

It is clear that "a State may not prohibit the exercise of rights which the federal Acts protect." *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 474 (1955). Nor may State laws stand that frustrate the purpose of national legislation. *Nash* v. *Florida Industrial Commission*, 389 U. S. 235 (1967); *Hill* v. *Florida*, 325 U. S. 538 (1945). And as stated in *Garner* v. *Teamsters Union*, 346 U. S. 485, 499 (1954):

> "• • • For a state to impinge on the area of labor conduct designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

As was said by Mr. Justice Holmes in *Charleston & Western Carolina R. Co.* v. *Yarnville Furniture Co.*, 237 U. S. 597, 604 (1915):

> "• • • When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

See also *Commonwealth of Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956); *Teamsters Local 24* v. *Oliver*, 358 U. S. 283, 296 (1959); *Teamsters Union* v. *Morton*, 377 U. S. 252, 259-260 (1964).

Surely in the vital area of federal interest here involved —perhaps more completely than in any other—the tests for determination of whether federal law has occupied the field

to the exclusion of state regulation are met. In *Rice* v. *Santa Fe Elevator Corporation*, 331 U. S. 218, 230 (1947), some of the constitutional tests for such occupation were succinctly summarized as follows:

> "• • • The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co.* v. *Public Service Commission*, 250 U. S. 566; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines* v. *Davidowitz*, 312 U. S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co.* v. *Railroad Commission*, 236 U. S. 439; *Charleston & W. C. R. Co.* v. *Yarnville Furniture Co.*, 237 U. S. 597; *New York Central R. Co.* v. *Winfield*, 244 U. S. 147; *Napier* v. *Atlantic Coast Line R. Co.*, *supra* [272 U. S. 605]. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill* v. *Florida*, 325 U. S. 538. • • •"

Significantly, most of the cases cited in the foregoing are cases in which railroads themselves were asserting, successfully and for their own benefit, that federal law precluded the application of state law to their affairs.

An examination of the scheme of regulation enacted in the Clayton Act, the Norris-LaGuardia Act, and the Railway Labor Act, renders inescapable the conclusion that Congress has intended to occupy the field of interstate rail-

road labor relations. Petitioners submit that each of the tests referred to above in the *Rice* case is met in this case. The scheme of federal regulation is pervasive, the field is one where clearly the federal interest is dominant, and the object sought (i.e., a balance of conflicting interests) reveals a purpose which varying state policies could only frustrate. As stated by a State Court not lightly prone to find that federal law has preempted state law in any area:

> "* * * But a study of that Act [the Railway Labor Act], to which we gave attention in *Steele* v. *L. & N. R. Co.*, 16 So. 2d 416, will disclose that it was the intent of Congress in large part if not entirely, to pre-empt the field covered by the salient features of the statute." *Alabama State Federation of Labor* v. *McAdory*, 18 So. 2d 810, 817 (Ala. S. Ct. 1944), *cert. dismissed*, 325 U. S. 450 (1945).

Federal preemption of law in labor litigation affecting interstate commerce has repeatedly been held by this Court to be a necessary part of the National labor policy. Thus it has been held that federal law governs suits under Section 301 of the Taft-Hartley Act even though the suit is brought in a state court. *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U. S. 448 (1957); *Local No. 174, Teamster* v. *Lucas Flour Co.*, 369 U. S. 95 (1962); *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962); *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650 (1965). Likewise, state court suits for damages under Section 303 of Taft-Hartley are governed by federal law. *Teamsters Union* v. *Morton*, 377 U. S. 252 (1964); *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966). The federal interest in regulation of the self-help activities of striking rail unions is

fully as complete as under Taft-Hartley, where " . . . the policy of the law is so dominated by the sweep of federal statutes that legal regulations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Teamsters Union* v. *Morton*, 377 U. S. 252, 261 (1964); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942).

Federal law must similarly govern the rights of parties in situations arising out of the Railway Labor Act, as this Court held in *International Ass'n of Mach.* v. *Central Airlines*, 372 U. S. 682 (1963). The Florida courts below erroneously applied Florida law in this case so as to outlaw conduct that is protected and legal under controlling federal law.

II.

The Peaceful Picketing Here Involved, Addressed to Fellow Railroad Workers in the Same Industry, Is Legal Concerted Activity for the Purpose of Mutual Aid and Protection Under Controlling Federal Law.

A. *The Clayton Act and the Norris-LaGuardia Act Are Applicable to the Conduct Here Involved and Protect It*

In the preceding section petitioners have demonstrated that the question of the scope of self-help rights available to striking employees under the Railway Labor Act is one which must be answered in terms of federal labor law and national labor policy. Respondents, however, have suggested the existence of a vast "gap" in the federal regulatory scheme (Respondent's Brief in Opposition, p. 20) which must be filled by the different laws of the fifty states of the Union. Petitioners submit that the statutory "gap" suggested by respondent is simply non-existent, as an examination of the history, terms, and purposes of the major legislative ingredients of the national labor policy reveals.[18]

With passage of the Interstate Commerce Act in 1887, 24 Stat. 379, 49 U. S. C. §1, *et seq.*, and the Sherman Act in 1890, 26 Stat. 209, 15 U. S. C. §1, *et seq.*, federal courts became the final arbiters of the rights of labor and management in most industrial disputes affecting interstate commerce. Relying upon one or the other of these two

---

[18] This familiar history has been examined and re-examined by this Court in numerous opinions. See, e.g., *National Woodwork Mfrs. Ass'n* v. *N. L. R. B.*, 386 U. S. 612, 620-624 (1967); *Milk Wagon D. Union* v. *Lake Valley F. Products*, 311 U. S. 91, 100-103 (1940).

broad statutes regulating interstate commerce—with an occasional assist from the postal power or the so-called general power of equity—the federal courts weighed the balance of power heavily against labor and in favor of management.[14] By and large, labor was limited in its arsenal of economic weapons simply to withdrawing the services of its members from the employ of the company with whom it had a dispute, and even in regard to this weapon, it was said that a peaceful strike on an interstate railroad would be unlawful. *Waterhouse* v. *Comer*, 55 Fed. 149, 157 (C. C. W. D. Ga. 1895).

Stymied in the courts, labor switched its battleground to the political arena. In the first Congress of President Taft's administration, twelve bills were introduced seeking modifications of the existing law governing labor injunctions, but none was reported out of committee. The Presi-

---

[14] Early railroad cases outlawing labor conduct as in violation of the Interstate Commerce Act are: *Chicago, B. & O. Ry. Co.* v. *Burlington, C. R. & N. Ry. Co.*, 34 Fed. 481 (C. C. Ia. 1888); *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730 (N. D. Ohio 1893); *In Re Debs*, 158 U. S. 564 (1895); *Ex Parte Lennon*, 166 U. S. 548 (1897).

Early railroad cases outlawing labor conduct as in violation of the Sherman Act are: *Waterhouse* v. *Comer*, 55 Fed. 149 (C. C. W. D. Ga. 1893); *United States* v. *Elliott*, 62 Fed. 801 (C. C. E. D. Mo. 1894); *Thomas* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803 (C. C. S. D. Ohio 1894); *United States* v. *Alger*, 62 Fed. 824 (C. C. Ind. 1894); *In Re Grand Jury*, 62 Fed. 840 (D. C. N. D. Cal. 1894); *United States* v. *Elliott*, 64 Fed. 27 (C. C. E. D. Mo. 1894); *United States* v. *Debs*, 64 Fed. 724, *aff'd on other grounds*, 158 U. S. 564; *United States* v. *Cassidy*, 67 Fed. 698 (D. C. N. D. Cal. 1895).

Early non-railroad cases applying the Sherman Act to outlaw labor conduct are: *United States* v. *Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994 (C. C. E. D. La. 1893), *aff'd*, 57 Fed. 85 (5 Cir. 1893); *Loewe* v. *Lawlor*, 208 U. S. 274 (1908) and 235 U. S. 522 (1915) (*Danbury Hatters' Case*); *Gompers* v. *Buck's Stove & R. Co.*, 221 U. S. 418 (1911); *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229 (1917).

dential campaign of 1912 followed, and in this campaign the Democratic Party committed itself in its platform to the withdrawal of labor and farm organizations from the scope of the Sherman Act. At about the same time Congress in January, 1912, opened hearings on the Wilson Bill (H. R. 11032, 62nd Cong., 1st Sess.). The House Judiciary Committee recast the Bill extensively and reported it out with a series of provisions limiting the power of courts of the United States to issue injunctions "involving or growing out of a dispute concerning terms or conditions of employment" and cataloging specific acts against which no injunction could issue, including *inter alia:* terminating employment or persuading others by lawful means to do so; peacefully communicating information; ceasing to patronize any party to such a dispute or persuading others by peaceful means so to do; peaceable assembly in a lawful manner for lawful purposes (H. R. 23635, 62nd Cong., 2nd Sess.; see 48 Cong. Rec. 6415, 1912).

The majority report of the House Judiciary Committee stated the purpose of the Bill as follows:

> "The second paragraph of section 266c is concerned with specific acts which the best opinion of the courts holds to be within the right of parties involved upon one side or the other of a trades dispute. The necessity for legislation concerning them arises out of the divergent views which the courts have expressed on the subject and the difference between the courts in the application of recognized rules." (48 Cong. Rec. 6458.)

The opponents of the Bill attacked the part cataloging the specific acts or rights of a party to a labor dispute

as being "the most vicious proposal of the whole bill" in that its "obvious purpose * * * is to legalize the modern strike and secondary boycott as instruments of industrial warfare, and to place the destructive machinery of these dangerous and cunningly devised weapons beyond the preventive power of our courts of justice." (48 Cong. Rec. 6421.) John W. Davis of West Virginia replied in favor of the Bill that it was an "effort to crystallize into law the best opinions of the best courts." (Id. at 6438.)

The Wilson Bill passed the House, but died in the Senate. However, in the next Congress, Mr. Clayton as Chairman of the House Judiciary Committee reported a Bill (H. R. 15657) supplementing the federal anti-trust laws, and included therein, as Section 18, was the identical language of the Wilson Bill with one significant addition: following the catalogue of specific rights or acts that could not be enjoined were added the words: "nor shall any of the acts specified in this paragraph be considered or held unlawful." (51 Cong. Rec. 9652 (1914).)

Much of the debate on the labor provisions of the Clayton Bill centered around whether the language "ceasing to patronize * * * or pursuading others by peaceful means so to do" did, or did not, legalize a secondary boycott. (51 Cong. Rec. 9082, 9652, 9654-9658.) Clarifying amendments were offered using the term "secondary boycott." Wisely, petitioners submit, these were rejected and the statutory language scrupulously avoided the vague and emotional words "secondary boycott" which would necessarily have imported ambiguity to the specific labor conduct described.

Both the House and the Senate passed the Clayton Act with some modifications of phraseology during the summer

of 1914, and on October 15, 1914, President Wilson affixed his signature to the Act and it became federal law. As enacted, the most controversial part (Section 20, 38 Stat. 738, 29 U. S. C. §52, Appendix M, pp. 81a-82a) provides as follows:

> "And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*"

But labor's victory in the political arena proved illusory. The first case to come before the Court involving Section 20 of the Clayton Act was *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1921). In this case, the Machinists

Union sought to organize the only non-union manufacturer among four national producers of large newspaper printing presses. Pressure was exerted on Duplex by persuading local union members not to work on or repair Duplex presses wherever they were installed or to work for any company that used them, and by appealing to employees of hauling companies not to carry the presses. Duplex filed suit under the Sherman Act, and the Union defended on the basis of the Clayton Act. The District Court and the U. S. Court of Appeals for the Second Circuit sustained the Clayton Act defense, and the case came to this Court by appeal.

A majority of the Court held that the union conduct was not protected by Section 20 of the Clayton Act in that it was not "normal and legitimate" activity (as defined by the Court) and the relation of the local unions to the dispute was too remote, in that the participants did not stand in the proximate relationship of employer and employee. Describing the Union's techniques as a "secondary boycott," the Court ruled that Duplex had a clear right to an injunction under the Sherman Act and that the defendants should be enjoined from interfering with the sale, transportation, use or repair of Duplex presses or from persuading anyone to refrain from working for any firm using or handling such presses.

Mr. Justice Brandeis, joined by Justices Holmes and Clarke, dissented in an opinion which has since "• • • carried the day in the courts of history as evidenced by subsequent congressional action and decisions of this Court." *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U. S. 676, 703 (concurring opinion of Mr. Justice Goldberg, joined by Justices Harlan and Stewart). Disagreeing with the ma-

jority's narrow reading of the Clayton Act, Mr. Justice Brandeis emphasized the concept of the *"economic self-interest"* of the participants as the touchstone in determining the proximity of their relation to the dispute and construed the Clayton Act as " • • • declaring the right of industrial combatants to push their struggle to the limits of the justification of self-interest." 256 U. S. at 488.

The *Duplex* decision was followed by a series of decisions in the same vein proscribing concerted labor conduct of all types, both primary and secondary in nature. In *American Steel Foundries* v. *Tri-City Central States Council,* 257 U. S. 184 (1921), peaceful picketing of a plant in protest against a wage reduction was permitted, but only by employees who had been actually employed at the plant. No others were allowed to participate in the picketing, and the pickets were required to be alone—that is, only one in number—at each point of entrance.[15] See also, e.g., *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Ass'n of North America,* 274 U. S. 37 (1927); *Coronado Coal Co.* v. *United Mine Workers of America,* 268 U. S. 295 (1925); *Truax* v. *Corrigan,* 257 U. S. 312 (1921); *United States* v. *Railway Employees' Department of American Federation of Labor,* 283 Fed. 479 (D. C. Ill. 1922); see generally Frankfurter and Greene, *The Labor Injunction* (1930), pp. 165-191.

Organized labor again took its case to Congress. And again Congress responded in 1932 by enactment of the

[15] It is interesting to contrast Chief Justice Taft's statement in this opinion that the closer picketing is to an employer's place of business the greater the obstruction and interference is to "the property right of access of the employer" (257 U. S. at 204) with present-day law under Taft-Hartley requiring picketing to be as close as possible to the employer's place of business. See *Local 761, Inter. U. of E., R. & M. Wkrs.* v. *N. L. R. B.,* 366 U. S. 667 (1961).

Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §101 *et seq.*, entitled an act "To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, *and for other purposes.*" This remarkable piece of legislation —obviously drafted with the fear in mind that it might be declared unconstitutional (under now discredited concepts of substantive due process) or else so hostilely and narrowly construed as to defeat its purposes[16]—intermixes substantive and procedural reforms in a truly amazing fashion.

The law starts out by declaring "the public policy of the United States" to be in favor of the right of the individual unorganized worker to have "full freedom" of association and self-organization and in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection; * * *" (Section 2, A. p. 74a). Section 3 outlaws the yellow dog contract (A. p. 75a). Section 4 precludes labor injunctions against, *inter alia*: ceasing to perform any work; giving or withholding from any person participating or interested in a labor dispute of things of value; giving publicity to the existence of, or the facts involved in, any labor dispute by patrolling or by any other method not involving fraud or violence; assembling peaceably to act in promotion of interests in a labor dispute; and inducing others without fraud or violence to do any of the foregoing acts. Section 5 precludes the granting of relief against workers and their unions on the ground that they are an unlawful combination or conspiracy for doing in concert any of the acts listed in Section 4. Section 6 provides new and more stringent substantive rules for im-

[16] See Witte, *The Federal Anti-Injunction Act*, 16 Minn. L. Rev. 638, 648-649 (1932).

posing vicarious liability on unions. Section 7 bans trials by affidavits; requires substantive findings as a condition to the issuance of injunctive relief, among which must be a finding that public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection; specifies that notice must be given both to the person against whom relief is sought and to the chief public official in the county and city involved; limits the effectiveness of temporary restraining orders issued without such notice to five days; and requires and prescribes the type of bonds to be posted by one obtaining a labor injunction. Section 8 defines and modifies the substantive doctrine of unclean hands. Section 9 prescribes the allowable form and content of labor injunctions. Section 10 provides for a speedy right of appeal. And Section 13 defines the elusive term "labor dispute" in the broadest possible terms as where the case involves persons who are "in the same industry, trade, craft, or occupation; or have direct or indirect interests therein" and "regardless of whether or not the disputants stand in the proximate relation of employer and employee."

As stated by Mr. Justice Goldberg in his concurrence in *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U. S. 676, 703 (1965):

> "• • • The Norris-LaGuardia Act, • • •, was passed by Congress in 1932, expressly to overrule the majority opinion of Duplex and the cases that followed it and to affirm the philosophy of the dissenters in those cases. See *United States* v. *Hutcheson*, 312 U. S. 219, 235-236; *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 102-103; *New Negro Alliance* v. *Sanitary Grocery Co.*, 305 U. S. 552, 562.

> "Although framed in terms of restrictions on the use of injunctions, this Court in *United States* v. *Hutcheson,* 312 U. S. 219, 235-236, recognized that the Act's 'underlying aim * * * was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated * * * .'"

Following enactment of Norris-LaGuardia, a series of cases came before this Court involving concerted labor conduct which was clearly and obviously in the nature of a "secondary boycott." As in *Duplex,* the complainants asserted that because of the "secondary" nature of the conduct, it was not covered by the Clayton Act and the Norris-LaGuardia Act and was therefore in violation of the Sherman Act. And in *Lake Valley F. Products* v. *Milk Wagon D. Union,* 108 F. 2d 436 (7 Cir. 1939), the U. S. Court of Appeals adopted this view, citing and relying upon the *Duplex* decision. This Court granted certiorari, and in a unanimous opinion by Mr. Justice Black reversed, saying:

> "Second. The Court of Appeals concluded that the defendants' picketing activities constituted a secondary boycott in violation of the Sherman Anti-Trust Act, and that for this reason, regardless of the Norris-LaGuardia Act, the District Court had jurisdiction to grant an injunction even though the case arose out of or involved a labor dispute. In this the Court was in error." *Milk Wagon D. Union* v. *Lake Valley F. Products,* 311 U. S. 91, 100 (1940).

The matter again came before this Court in a more substantive fashion in *United States* v. *Hutcheson,* 312 U. S.

219 (1941), involving a case where the Government had indicted the president of a union for an alleged violation of the Sherman Act by engaging in a "secondary boycott." In sustaining a demurrer to the indictment, the Court in an opinion by Mr. Justice Frankfurter ruled:

> "• • • More especially the [Norris-LaGuardia] Act explicitly formulated the 'public policy of the United States' in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the Duplex Printing Press Co. Case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and §20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.
>
> "• • • So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under §20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means • • •." 312 U. S. at 231-232.
>
> "• • • •
>
> "The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive

> judicial construction. * * * The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light §20 removes all such allowable conduct from the taint of being a 'violation of any law of the United States,' including the Sherman Law." 312 U. S. at 235-236.

A close reading of the facts in *Hutcheson* demonstrates the applicability of that decision to the present case. There the Carpenters and Machinists unions became involved in a dispute over erecting and dismantling machinery for the Anheuser-Busch Company. Unable to secure the demanded jobs from Anheuser-Busch, the Carpenters struck not only that company and a construction firm doing work on its premises, but also picketed an adjacent employer who leased land from Anheuser-Busch, and a construction company which was erecting a building for the lessee. Presumably the picketing of the adjacent premises was for the purpose of placing additional pressure on Anheuser-Busch in its dispute with the Carpenters. Yet the Court there held that such conduct was not only immune from a federal injunction by reason of Norris-LaGuardia, *but also lawful conduct under Section 20 of the Clayton Act.*

The *Hutcheson* decision, read together with a series of companion memorandum decisions affirming lower court dismissals of Sherman Act indictments,[17] which involved

[17] Additional memorandum opinions of the Court, in all of which judgments sustaining demurrers to Sherman Act indictments were affirmed, include: *United States* v. *International Hod Carriers' and Common Laborers' District Council of Chicago,* 313 U. S. 539 (1941), where the defendant organizations threatened and induced strikes on the part of customers' employees to prevent the sale by manufacturers of labor-saving concrete truckmixers in Chicago;

various forms of conduct constituting traditional "secondary" activity, compels the conclusion that prior to the passage of the Taft-Hartley Act in 1947, such conduct not only was not enjoinable under the Norris-LaGuardia Act but was legal under the Clayton Act.

The Taft-Hartley Labor-Management Relations Act of 1947,[18] in Section 8 (b) (4) of that Act, 29 U. S. C. §158 (b) (4), of course, added a congeries of provisions declaring certain forms of secondary activity by unions to be violative of the National Labor Relations Act. Such secondary conduct, as therein defined, was made enjoinable, but only by federal courts at the request of the National Labor Relations Board. See 29 U. S. C. §160 (h), (j), (l).

As this Court noted in *N. L. R. B.* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 688 (1951), and also in *National Woodwork Mfrs. Ass'n* v. *N. L. R. B.*, 386 U. S. 612, 624 (1967), Senator Taft, sponsor of the amend-

---

United States v. *United Brotherhood of Carpenters and Joiners of America*, 313 U. S. 539 (1941), in which defendant A. F. L. unions, subsequent to the certification of a C. I. O. union by the NLRB as exclusive bargaining agent of a lumber firm's employees, took such measures as (a) instigation of strikes by customers' employees, (b) circulation of a blacklist, and (c) refusal to work on "unfair" goods; *United States* v. *Building & Construction Trades Council of New Orleans*, 313 U. S. 539 (1941), in which defendant A. F. L. unions refused to handle materials delivered by C. I. O.—represented truckers, although the C. I. O. was NLRB certified and labor contracts had been entered into between the C. I. O. union and the trucking firms.

[18] Respondent throughout this litigation has failed to suggest what purpose was embodied in the Taft-Hartley amendments prohibiting certain forms of secondary activity and permitting the Nat'l Labor Relations Board to seek injunctions against them, if as respondent has suggested, such conduct was illegal and enjoinable without reference to those amendments. All the controversy concerning Taft-Hartley becomes meaningless under respondent's view.

ments in the Senate and Chairman of the Senate Committee on Labor and Public Welfare, said, in discussing Section 8 (b) (4) of the Act:

> "• • • under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts." 93 Cong. Rec. 4198.

But this clearly shows that Congress recognized the existing state of the law which it was changing in the Taft-Hartley amendments, and the legislative history shows equally clearly that Congress deliberately chose *not* to change such existing law as to railway workers covered by the Railway Labor Act:

> "Mr. McGrath. • • • The thought occurred to me, in listening to the discussion by the very eminent Senator from Montana, that *by the incorporation of these restrictive provisions with respect to other types of labor we are making rather an unfair distinction between American labor unions. The railroads and railroad systems can do certain things that other employees are prohibited by Federal law from doing. I am wondering if someone can enlighten us on the justification for that sort of distinction.*
>
> "Mr. Ives. Mr. President, will the Senator yield?
>
> "Mr. Murray. I yield.
>
> "Mr. Ives. I think the Senator from Rhode Island will find that there is nothing unfair in what is being eliminated by that process. There is nothing unfair in the procedure being followed for the elimination of abuses.

"Mr. McGrath. But may I ask the Senator from New York this question: *If we do not eliminate such practices with respect to railway workers—in other words, railway workers may engage in these very practices without being in violation of Federal law—is it not unfair to provide that employees in other industries will be in violation of the law if they engage in such practices?*

"Mr. Ives. Mr. President, will the Senator yield further?

"Mr. Murray. I yield.

"Mr. Ives. *I am not upholding in any way, shape, or manner any practice which is contrary to the ideas set forth in this bill or contrary to the principles being laid down, but I am saying that the matters to which the Senator from Montana has referred are not covered by this bill.*

"Mr. Taft. Mr. President, will the Senator yield?

"Mr. Murray. I yield.

"Mr. Taft. *I want to point out that railway labor has never been covered by the Wagner Act; it has always been covered by the Railway Labor Act, which provides a somewhat different procedure. We saw no reason to change that situation, because there were no abuses which had arisen in connection with the operation of the Railway Labor Act.* In general, we confined our amendments to the bill to acts which from evidence before the committee, were specifically shown to be abuses." Vol. II, *Legislative History of the Labor Management Relations Act, 1947*, p. 1571.

It was against this background that Justice Frankfurter, again writing for the Court in *Bakery Sales Drivers' Union* v. *Wagshal,* 333 U. S. 437 (1948), discussed the applicability of the Norris-LaGuardia Act to traditional secondary activity, as against a claim of mootness based upon the Taft-Hartley amendments:

> "The short answer to the argument that the Labor-Management Relations Act of 1947, P. L. 101 80th Cong., 1st Sess., §10 (h), 29 U. S. C. A. §160 (h), has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party." 333 U. S. at 442.

The protections afforded by the Clayton Act to ". . . the immunized trade union activities as redefined by the later [Norris-LaGuardia] Act . . . ", *United States* v. *Hutcheson, supra,* 312 U. S. at 236, are fully applicable to petitioner BRT's conduct herein viewed from any standpoint, i.e., primary or secondary. The Clayton Act has never been repealed (save for a period of judicial limitation) and remains, where applicable, as a strong and legislative expression by Congress of the "national labor policy."

It can hardly be accepted that a "huge gap" requiring the intervention of state notions of policy in the labor relations of the Nation's railroads exists, where two of the great labor statutes of this century are fully applicable to protect petitioners' conduct, under any view, from the taint of being a violation of any law of the United States.

The Fifth Circuit Court of Appeals, in discussing the applicability of the Norris-LaGuardia Act (which under *Hutcheson* is also the applicability of Section 20 of the Clayton Act) to the operative facts from which this case arose, stated in *Brotherhood of R. Trainmen* v. *Atlantic Coast Line R. Co.*, 362 F. 2d 649, 654-655 (Appendix H, pp. 27a-28a):

> "As we see it, this 'economic self-interest' test, by definition, must be primarily a factual inquiry. In this case the picketing union, allegedly attempting to limit the scope of its appeal to its dispute with FEC, had an obvious interest in putting a stop to *the Terminal Company's performing services related to the normal day-to-day operation of FEC trains—operating with striker replacement crews.* A similar interest is present in any case in which a labor group attempts to bring secondary pressure on the employer with whom its primary dispute exists by means of exerting primary pressure upon a secondary employer, who has aligned himself with the primary employer in some substantial manner—*here by providing certain essential services and facilities to the primary employer, FEC.*
>
> "Turning next to a further examination of the economic interests of the responding employees of the secondary employer-appellees, it should be emphasized that their interests go beyond the 'common industrial interest' discussed above. It can be stated unequivocally that Seaboard and FEC are in direct competition for passenger and freight traffic south of West Palm Beach. As far as the ACL and FEC are concerned, the competition, although less direct, cannot be said to be non-

existent, especially between Jacksonville and a line drawn from Orlando to the Atlantic Ocean. The significance of this competition lies in the fact that the FEC, by changing work rules and lowering wages, presents a direct threat to the job security of the employees of SAL and ACL. In other words, by operating under such lower than union standards of employment, the FEC enjoys a competitive advantage, which may enable it to increase its share of traffic, vis a vis, ACL and SAL, and, consequently, the latter two railroads could be forced to either (a) lower their standards or (b) lay off a sufficient number of employees to compensate for their reduced traffic share. Accordingly, it is improper to regard the responses of ACL and SAL employees as merely sympathetic."

This analysis by the Court of Appeals correctly points up the geographic and economic limitations upon the "economic self-interest" which a union may assert, and still claim the protection of the Norris-LaGuardia Act and Section 20 of the Clayton Act. Thus the "imaginary horribles" previously paraded by respondent before this Court of a nationwide rail stoppage, e.g., picketing of the Washington, D. C., Terminal, as a result of a dispute with one railroad in Florida, are exposed for what they are. Moreover, the emphasis placed by the Court of Appeals upon the integral nature of FEC's and Jacksonville Terminal Company's operations forcefully points to the fact that BRT's picketing activity, even under Taft-Hartley standards, is "primary" picketing.

In the prior federal court litigation between respondent and petitioners arising out of the identical conduct here involved (and also in similar litigation arising out of simi-

lar picketing at FEC's southern terminus, *Brotherhood of Locomotive Firemen & Enginemen* v. *Florida East Coast R. Co.*, 346 F. 2d 673 (5 Cir. 1965)), it was substantively determined that:

1. The picketing involved grows out of the labor dispute at FEC. 362 F. 2d at 650 (A. pp. 18a-19a); 346 F. 2d at 675.

2. The refusal of respondent's and the other connecting carriers' employees to cross the picket lines is a part of the major dispute at FEC. 362 F. 2d at 655 (A. pp. 27a-28a); 346 F. 2d at 676.

3. Respondent's employees and the employees of other connecting carriers are interested in the major dispute with FEC as members of same trade and industry as the striking FEC workers. 362 F. 2d at 653 (A. pp. 25a-28a); 346 F. 2d at 675.

4. Respondent's employees and the employees of the other connecting carriers desire to make common cause with FEC's striking employees by honoring their picket lines. 362 F. 2d at 655 (A. pp. 27a-28a); 346 F. 2d at 675.

These findings, already litigated between petitioners and respondent, and clearly beyond challenge, show that petitioner BRT's conduct is fully covered by the Railway Labor Act, the Clayton Act, and the Norris-LaGuardia Act and is lawful under these federal statutes and under national labor policy as declared by Congress. There is no "gap" in federal law.

Since 1887, when Congress first passed the Interstate Commerce Act, and 1888, when Congress first passed a law

providing for voluntary arbitration and public investigation of railway labor disputes, 25 Stat. 501, federal law has occupied this area. To be sure, during the period from 1887 to passage of the Clayton Act in 1914, the Railway Labor Act in 1926, and the Norris-LaGuardia Act in 1932, the federal law that did occupy the field was most unfavorable to railway labor's interests. See *In Re Debs*, 158 U. S. 564 (1895); *Ex Parte Lennon*, 166 U. S. 548 (1897); *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730, 746 (N. D. Ohio 1893) (opinion by Circuit Judge, later Chief Justice Taft). But Congress saw fit to change the federal law. Under the guise of applying state law, respondent now seeks to avoid the consequences of that change.

B. *The Peaceful Picketing Conduct Here Involved Is "Primary" and Not "Secondary" Labor Conduct Under Section 8 (b) (4) of the Labor Management Relations Act's Amendments to the National Labor Relations Act*

Respondent has made constant reference to the picketing of its premises by petitioner BRT as being a "secondary boycott" (e.g., Brief of Respondent In Opposition, p. 1) and the Florida trial Court found that such picketing "will constitute economic pressure in the nature of a secondary boycott * * * ." (JA 184, Appendix A, p. 5a). Petitioner submits, however, that even under the standards established by the Labor Management Relations Act, 1947, P. L. 101, 80th Congress, 61 Stat. 136, making certain forms of secondary conduct by labor organizations unfair labor practices,[19] the BRT picketing that is here involved is lawful, primary and protected concerted activity.

---

[19] Not all so-called secondary boycotts were outlawed in §8 (b) (4) of Taft-Hartley. *Local 761, Inter. U. of E., R. & M. Wkrs.* v. *N. L. R. B.*, 366 U. S. 667, 672-673 (1961); *Teamsters Union* v. *Morton*, 377 U. S. 252, 258-259 (1964).

The categorization of many different forms of concerted labor activity under the rubric "secondary boycott" has led to much disagreement concerning the applicability of the term to particular fact situations. This Court has noted that the line between "primary" and "secondary" activity is not "glaringly bright."[20] Significantly, Congress has never used the term "secondary boycott" in any of the many labor laws it has enacted.[21]

The record in this case clearly reveals that the railroad yards which were picketed, are yards where FEC trains and crews daily operate. In these yards over 30% of the freight interchanged is FEC freight. It is the place where employees of connecting carriers come in contact with FEC operations, where they deliver cars to FEC to be removed by FEC engines and crews, where they maintain trackage over which FEC operates and throw switches and give signals for FEC train movements, and where they render various other direct services for FEC. The picketing of these FEC operations and the appeal by respondents to

---

[20] "The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade." *Local 761, Inter. U. of E., R. & M. Wkrs.* v. *N. L. R. B.*, 366 U. S. 667, 673 (1961).

[21] Of course, under the all-inclusive language of §8 (b)(4) of the LMRA (29 U. S. C. §158·(b)(4), Appendix N, pp. 86a-87a), which this Court has noted literally bans "most strikes historically considered to be lawful, so-called primary activity" (*Local 761, Inter. U. of E., R. & M. Wkrs.* v. *N. L. R. B.*, 366 U. S. 667, 672 (1961)), fine distinctions have been spun involving the tenuous difference between mere "hope" and "intent". 366 U. S. at 673-674. The constitutionality of §8 (b)(4), if literally applied, would (we submit) present serious questions under the First Amendment. Defining the line between "hopes to achieve the forbidden objective," conceded to be universal, and an intent to achieve it, may be the only alternative to facing these difficult constitutional questions.

their fellow railroad workers not to render services to FEC was made at the closest public locations to these operations.

FEC also does business with the public on the Terminal Company premises, using the Terminal Company passenger station as the terminus of the passenger train which it continues to operate daily. Indeed the only place where it is possible to purchase a ticket south-bound on this train is at the Jacksonville Terminal Company. The Terminal Company services the FEC passenger equipment and passenger engines, cleans, ices and waters the FEC cars and repairs FEC airconditioning equipment.

A recent decision of this Court squarely in point is *United Steelworkers* v. *N. L. R. B.*, 376 U. S. 492 (1964). In that case the Steelworkers had struck the Carrier Company and had picketed a railroad spur leading to the Carrier Company plant. The picketing was on railroad property, was an appeal to the railroad crews, and was done for the purpose of inducing the railroad to cease providing rail service to the Carrier Company for the duration of the strike, 376 U. S. at 496. This picketing was held to be primary and legal picketing under Section 8 (b)(4)(B) of the Labor Management Relations Act, 29 U. S. C. 158(b)(4)(B).

The Court of Appeals there had held the picketing to be secondary and illegal because it was an appeal to neutrals not to do business with the struck employer. This Court reversed and held that primary picketing is not limited to an appeal to employees of the struck employer but also includes an appeal to those neutral employees making deliveries to the struck employer (or receiving deliveries

from the struck employer) or performing services which aid the struck employer's day-to-day operations.

This Court also held that picketing upon the premises of the neutral was permissible if "there was no other place where the union could have brought home to the railroad workers servicing Carrier its dispute with Carrier." 376 U. S. at 500 (quoting from 311 F. 2d 135, 154).

If picketing of rail deliveries to a struck plant is primary activity, a fortiori the picketing of rail deliveries by one railroad to another is primary activity in a railroad labor major dispute.

In addition there has developed under the Labor Management Relations Act decisions a doctrine often called the "ally" doctrine. Under this doctrine, picketing of the "ally" itself is primary picketing if the nexus between the ally and the primary employer is sufficiently close. Perhaps the first case which applied these principles was *Douds* v. *Metropolitan Federation of Architects,* 75 F. Supp. 672 (D. C., S. D., N. Y., 1948). There the relationship between the primary employer and the ally antedated the strike. They were separate business entities. The Court held that because the ally was doing for the primary employer the same type of work as was normally performed by the primary employer, it was subject to being picketed. The fact that the particular relationship was common in that industry was held to be of no consequence. Most significantly, Senator Robert Taft stated that this decision was a correct interpretation of the Taft-Hartley Amendments to the National Labor Relations Act. (See 95 Congressional Record 8709.)[22]

---

[22] Referring to §8(b)(4), Senator Taft also said: "This provision makes it unlawful to resort to a secondary boycott to injure

Surely the Jacksonville Terminal Company which is owned and controlled in part by FEC, which is an integral part of the FEC system, which is a place where FEC trains and crews daily operate, and which is doing "struck work" is such an ally. Other applicable decisions under the ally doctrine are: *N. L. R. B.* v. *Electrical Workers, CIO,* 228 F. 2d 553 (2 Cir. 1955), *cert. den.,* 351 U. S. 962 (1956); *N. L. R. B.* v. *Local 459, Electrical Workers,* 289 F. 2d 62 (2 Cir. 1961); *Masters, Mates & Pilots and Ingram Barge Co.,* 136 N. L. R. B. No. 112, 49 L. R. R. M. 1943 (1962).

Thus, to call the picketing here involved "secondary" under any definition would be simply to say that the picketing has secondary consequences to others. But all "primary" picketing has "secondary" aspects. *United Steelworkers* v. *N. L. R. B., supra; Local 761, Inter. U. of E., R. & M. Wkrs.* v. *N. L. R. B.,* 366 U. S. 667 (1961); *N. L. R. B.* v. *International Rice Mill Co.,* 341 U. S. 665 (1951). And under the standards developed under the Labor Management Relations Act, as shown above, the BRT picketing here involved cannot be catagorized as a secondary boycott.

---

the business of a third person *who is wholly unconcerned* in the disagreement between an employer and his employees." 93 Cong. Rec. 4198. The action taken by respondent Terminal Company when the non-operating unions struck FEC in January, 1963, shows it does not qualify as one who is "wholly unconcerned." (JA 325-328, 36-46.)

III.

The Norris-LaGuardia Act, 29 U. S. C. §101 *et seq.*, Applies to a State Court Adjudicating, as Here, a Labor Case Controlled by Federal Law.

As this Court noted in *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 514, n. 8 (1962):

> "The relation of the Norris-LaGuardia Act to state courts applying federal labor law has never been decided by this Court."

Similarly, the question was extensively briefed and argued to this Court in *Avco Corporation* v. *Aero Lodge No. 735*, —— U. S. ——, 88 S. Ct. 1235 (1968), but was not reached since that case had been properly removed to a U. S. District Court.[23]

Lower federal courts and state courts, however, have considered the question with conflicting results and often split opinions. Compare the U. S. Court of Appeals for the Sixth Circuit's opinion in the *Avco Corporation* case, 376 F. 2d 337, 343, with *American Dredging Co.* v. *Local 25*, 338 F. 2d 837 (3 Cir. 1964), *cert. den.*, 380 U. S. 935 (1965), and *McCarroll* v. *Los Angeles District Council*, 49 Cal. 2d 45, 315 P. 2d 322 and (dissenting opinion) 336, *cert. den.*, 355 U. S. 932 (1958).

---

[23] In view of the many questions here involved, considerations of brevity preclude as extensive an argument here on this point as was made in Respondents' Brief in the *Avco Corporation* case (No. 445, O. T. 1967). Petitioners therefore respectfully refer the Court to Respondents' Brief in that case, and especially to pages 44-70 thereof, for a thorough and able discussion of the authorities and reasons why the national labor policies as expressed in Norris-LaGuardia, including the restrictions on labor injunctions, apply to a state court trying a case controlled by federal law.

The question is here squarely presented not only in terms of whether the State Court below had equity jurisdiction to issue the injunction here involved, but also in terms of the degree of proof required in order to hold the non-BRT defendants (i.e., the BLF&E, the ORC&B, Lowell Kennedy and T. C. Bolin) responsible for the BRT's acts under Section 6 of Norris-LaGuardia (29 U. S. C. §106, Appendix L, pp. 76a-77a).[24] As previously discussed, the only evidence of BLF&E or ORC&B connection with the picketing is the fact that their initials were originally printed on the picket signs and then obliterated by tape before use of the signs. In addition, an ORC&B representative, petitioner T. C. Bolin, attended one or both informational meetings called by the BRT prior to the picketing to advise other unions of BRT's intent to picket. While this is apparently sufficient under Florida law to constitute a threat to picket, or participation in the picketing, by the BLF&E and the ORC&B, it clearly does not meet the requirements for "clear proof of actual participation in, or actual authorization of * * * or of ratification of such acts after actual knowledge thereof" contained in Section 6 of Norris-LaGuardia. *United Mine Workers* v. *Gibbs,* 383 U. S. 715, 733-742.

Numerous considerations compel the conclusion that the substantive provisions of Norris-LaGuardia—including the restrictions on injunctive relief[25]—are applicable to a state

---

[24] The Norris-LaGuardia defense was specifically raised in the answer (JA 35), and the allegations that the non-BRT defendants were involved or connected with the picketing were also denied (paragraphs 2 and 6 of amended complaint, JA 21-23, and answer thereto, JA 29-30).

[25] The Norris-LaGuardia Act, of course, did not completely ban all use of injunctions in labor dispute cases. *Brotherhood of R. Trainmen* v. *Toledo, P. & W. R.R.,* 321 U. S. 50, 58-59 (1944).

court deciding a labor case controlled by federal law. While the Norris-LaGuardia Act, for reasons traced in an earlier portion of this brief, was cast in terms of "jurisdiction," this is a restriction only on the general equity power to grant a particular type of relief, i.e., injunctive relief, and not a restriction on the power to adjudicate the case as in the sense of jurisdiction over the parties and the subject-matter. *Avco Corporation* v. *Aero Lodge No. 735*, —— U. S. ——, 88 S. Ct. 1235, 1237-1238 (1968). As such, these equitable restrictions have substantive import, as do other portions of the Act, e.g., its declaration of "the public policy of the United States" (Section 2), its outlawry of the yellow dog contract (Section 3), its requirement for "clear proof" to hold one responsible or liable for the unlawful acts of another (Section 6), and its requirement as a precondition to injunctive relief that all other means available for settlement be first exhausted (Section 8).

If the foregoing substantive provisions of Norris-LaGuardia are not applicable to state courts trying labor cases controlled by federal law, the result will be not only a frustration of national labor policy but a crazyquilt of jurisprudence which can only bring disrespect to the entire administration of law. The desideratum of national labor policy is uniformity.[26] This is emphatically so where the issue is the scope of self-help rights available to striking employees of interstate carriers.

Uniformity as the governing principle here, as in other aspects of the labor relations of interstate carriers by rail

---

[26] *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236, 241-243 (1959); *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1, 10-11 (1957).

and air,[27] fits the ideal of the evenhanded rule of law. Whether a state-governed action is brought in a federal court via diversity, or a federal-governed action is brought in a state court, the same bundle of rights should be identically defined and subject to essential similarity in the means of enforcing the claim or defense in one court as in another. In a state-created action the "nub of the policy . . . is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result." *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204 (1956), quoting *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109 (1945). And in the enforcement of a federal right in a state court, "only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Dice* v. *Akron, Canton and Youngstown R.R.*, 342 U. S. 359, 361 (1952).[28] "In fact, since remedies form an ingredient of

---

[27] *I. A. M.* v. *Central Airlines*, 372 U. S. 682, 692 n. 16 (1963): "The needs of the subject matter manifestly call for uniformity. • • • The lack of uniformity created by dividing everything by 50 (or however many States the system spans) would multiply the burden by a substantial factor and aggravate the problem to an intolerable degree."

[28] See also, *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 243-246 (1942); *Brown* v. *Western Railway of Alabama*, 338 U. S. 294, 296, 298-299 (1949) "[W]hen federally-created rights are enforced in the state courts . . . the cardinal consideration is federal paramountcy . . . Moreover, federal paramountcy extends as much to procedural as to substantive matters; if the federal purpose is clear, and if it is valid, there is no room for local procedural autonomy. . . . and this is true whether the federal purpose is evidenced by an express Congressional enactment of a 'procedural' character or is reasonably inferable from the substantive federal right in issue." Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem*, 17 Ohio St. L. J. 384, 387 (1956).

any integrated scheme of regulation" (*San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236, 247), and procedural rules "themselves dig into 'substantive rights'" (*Brown* v. *Western Railway of Alabama*, 338 U. S. 294, 296), the procedure by which a right is protected and the remedy by which it is vindicated may well be more important than its purely substantive definition. And that is plainly and particularly true of a labor injunction, which frequently operates to dispose completely of the defendant's rights and render entirely illusory any resort to appeal or later correction. See *Local No. 438 Construction & Gen. Lab. U.* v. *Curry*, 371 U. S. 542, 550 (1963); *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 308 (1964); Witte, *The Federal Anti-Injunction Act*, 16 Minn. L. Rev. 638.[29]

These reasons urgently impel a holding that Norris-LaGuardia does apply and retains its vitality in a state court which undertakes to adjudicate a labor case controlled by federal law.

Moreover, both the literal language of the Norris-LaGuardia Act and the Supremacy Clause of the U. S. Constitution require such a holding. Thus, the Norris-LaGuardia Act used the term "court of the United States" to describe its coverage and expressly defines that term in Section 13 (d) as follows:

> "The term 'court of the United States' means any court of the United States whose jurisdiction has been *or may be* conferred or *defined or limited* by Act of

[29] "Strikes normally last only a short time, which makes the first action of the courts in labor injunction cases all but decisive in its effect upon the dispute. There is no way of measuring or compensating workmen for loss of a strike . . . ." 16 Minn. L. Rev. at 653-654.

Congress, including the courts of the District of Columbia."

There can be no doubt that state courts are literally included within this definition. Just to give one obvious example, state court jurisdiction has been limited and defined, and indeed precluded, under the National Labor Relations Act in the area where the jurisdiction of the National Labor Relations Board is arguably applicable. *Garner* v. *Teamsters Union,* 346 U. S. 485 (1953); *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959). The fields of copyrights, patents and federal anti-trust are other examples where Congress has defined or limited state court jurisdiction over federal question cases.[30] And certainly state courts *are* courts of the United States when they adjudicate a case controlled by federal law. The Supremacy Clause makes them so. Indeed for the first century of this Nation's history it was only state courts that enjoyed general federal question jurisdiction.

That state courts, when they adjudicate cases arising out of and controlled by federal law, are courts of the United States whose jurisdiction may be defined or limited by Act of Congress was even a matter expressly considered at the time the Constitution was adopted. Alexander Hamilton, writing in *The Federalist* No. 81 (1788), foresaw both the possibility and necessity that Congress would confer, define or limit state court jurisdiction over federal question cases:

"The power of constituting inferior courts is evidently calculated to obviate the necessity of having re-

[30] See 28 U. S. C. §1338; 15 U. S. C. §§15, 25; *Freeman* v. *Bee Machine Co.,* 319 U. S. 448, 451, n. 6 (1943).

course to the Supreme Court in every case of federal cognizance. It is intended to enable the national government to institute or authorize, in each State or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

"But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the State courts? This admits of different answers. Though the fitness and competency of those courts should be allowed in the utmost latitude, yet the substance of the power in question may still be regarded as a necessary part of the plan, if it were only to empower the national legislation to commit to them the cognizance of causes arising out of the national Constitution. To confer the power of determining such causes upon the existing courts of the several States, would perhaps be as much 'to constitute tribunals,' as to create new courts with the like power. But ought not a more direct and explicit provision to have been made in favor of the State courts? There are, in my opinion, substantial reasons against such a provision: the most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. . . . ." (*The Federalist*, Random House, Modern Library Ed., pp. 527-528.)

The crux of the matter was exposed by Justice Carter in dissent in *McCarroll* v. *Los Angeles District Council*, 49 Cal. 2d 45, 315 P. 2d 332, 336, *cert. denied*, 355 U. S. 932: "The rights * * * being controlled by federal law, that law must also measure the remedies available for otherwise the federal law is not being applied . . . [The injunction as] a remedy is more than mere procedure. It goes to the very essence of the right itself . . . This is especially true in injunctions in labor disputes, such as an injunction against a strike. The case is usually won or lost at the preliminary injunction stage, even before the hearing on the application for a permanent injunction—the final judgment . . . [T]he right not to be enjoined under the Norris-LaGuardia Act is a part of the federal right—a part and parcel of the rights which may be exercised * * *. Certainly a state court cannot give more relief (in fact, relief which will end the case) than a federal court when administering federal law. If it may, the requirement that the federal law be applied may well dwindle to nothing and there will be no uniformity as is sought by the federal Act in labor relations affecting interstate commerce. The right will be no greater than the remedy afforded for its protection which may vary from state to state. If as in *Brown* v. *Western R. of Alabama*, . . . 338 U. S. 294, the mere matter of state rules of pleading may not control in the enforcement of a federal law by a state court, then certainly the important and fundamental matter of allowing an injunction under state law cannot stand if the federal law forbids it." 315 P. 2d at 336, 338-339.

IV.

The Jurisdiction of the State Court in This Case Is Ousted by the Exclusive Primary Jurisdiction of The National Labor Relations Board Under *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959).

The *Garmon* case and its many progeny establish that both state and federal courts lack jurisdiction to adjudicate the legality of peaceful, orderly picketing which is "arguably subject" to the jurisdiction of the NLRB under the National Labor Relations Act, as amended, 29 U. S. C. 141 *et seq.*

Petitioners respectfully submit that the decisions of the State Courts below are in conflict with the decisions of this Court in *Garmon* and more particularly in *Local Union No. 25* v. *New York, New Haven and Hartford R. Co.*, 350 U. S. 155 (1956), and *Marine Engineers Benevolent Ass'n* v. *Interlake Steamship Co.*, 370 U. S. 173 (1962), and with the decision of the U. S. Court of Appeals in *International Bro. of Elect. Wkrs. v. NLRB*, 122 U. S. App. D. C. 8, 350 F. 2d 791 (D. C. Cir. 1965), *cert. den.*, 383 U. S. 943 (1966), a companion case also arising out of the FEC's stubborn labor difficulties.

The argument that the labor conduct here involved is "arguably subject" to NLRB jurisdiction is a simple one. Respondent Terminal Company is a railroad carrier which claims that petitioner labor organizations are engaging in a secondary boycott against it. Clearly the fact that respondent, as a railroad carrier, is not an "employer" within the meaning of the National Labor Relations Act, 29 U. S. C. 152 (2), does not preclude NLRB jurisdiction.

Local Union No. 25 v. *New York, New Haven & Hartford R. Co., supra.* Equally clearly the type of alleged labor conduct, i.e., a secondary boycott, is conduct which is arguably prohibited by the N. L. R. A., 29 U. S. C. 158 (b) (4). The question, then, is whether petitioners' status as railway labor organizations representing striking railroad employees so clearly precludes NLRB jurisdiction as to make the matter beyond argument. Petitioners, candidly, would have thought so prior to the decision in *International Bro. of Elect. Wkrs.* v. *NLRB,* 122 U. S. App. D. C. 8, 350 F. 2d 791 (D. C. Cir. 1965), *cert. den.,* 383 U. S. 943 (1966). That case involved eleven of the non-operating railway unions that went on strike against the FEC in 1963. Two of those unions that are composed and represent exclusively railroad employees under the Railway Labor Act were charged with engaging in secondary boycott picketing in connection with the FEC's spur track into Cape Kennedy, Florida. The U. S. Court of Appeals for the District of Columbia (Chief Judge Bazelon dissenting) sustained NLRB jurisdiction over the challenged conduct on the basis that the two picketing unions were acting as agents for the other nine non-operating unions, and these other nine unions were "mixed" unions, e.g., the International Association of Machinists, which in the course of their national activities represented both railroad and non-railroad employees. In other words, the fact that all eleven of the non-operating unions allegedly involved in the Cape Kennedy picketing were, in so far as that picketing was concerned, representing exclusively railroad workers engaged in a strike against a railroad arising under the Railway Labor Act was deemed not to preclude NLRB jurisdiction.

Here also the picketing union (BRT), and the two other unions found to be in concert with it, are so-called "mixed" unions, i.e., in the course of their national activities they represent non-railroad as well as railroad employees (JA 93-96, 120-122). It is true that they are not so thoroughly "mixed" as were some of the nine non-operating unions that did not actually picket in the Cape Kennedy case. But the decision of this Court in *Marine Engineers Benevolent Ass'n* v. *Interlake Steamship Co.*, 370 U. S. 173 (1963), teaches that where NLRB jurisdiction turns on the status of the picketing organization, this too is a matter vested by Congress in the exclusive primary jurisdiction of the NLRB and can not be initially determined by a state court.

Respondent argued in the companion federal court case and in the writ of prohibition case that:

> "It is somewhat difficult to say that this is a matter 'arguably' subject to the jurisdiction of the NLRB when no one is willing to step forward and make any such argument." [31]

But NLRB jurisdiction is not self-activating (see *Nash* v. *Florida Industrial Commission*, 389 U. S. 235, 88 S. Ct. 362, 365),[32] and it is not very difficult at all to understand why respondent, so long as it is armed with a state court injunction, does not step forward and invoke NLRB jurisdiction.

---

[31] Brief of Respondent Jacksonville Terminal Company in opposition, p. 17, Case No. 244, O. T. 1966, *Bro. of R. Trainmen* v. *Jacksonville Terminal Co.*

[32] "Implementation of the Act is dependent upon the initiative of individual persons who must, as petitioner has done here, invoke its sanctions through filing an unfair labor practice charge." 88 S. Ct. at 365.

Moreover, the question is not raised here merely as a matter of expediency to escape from an unwanted State Court injunction. Petitioners have been candid with every Court—both in this case and the several companion cases—in stating that *on the merits* they do not believe that Congress meant to include railroad unions representing railroad employees in a major dispute under the Railway Labor Act within the coverage of Taft-Hartley or the NLRB's jurisdiction, even though the unions might, in regard to other employees not involved in the activity which is challenged, represent some non-railroad employees. But this argument did not persuade a majority of the U. S. Court of Appeals for the District of Columbia in the *IBEW* v. *NLRB,* 350 F. 2d 791, case referred to above nor did it persuade a majority of the NLRB itself in that case. And it is significant that not only was picketing by FEC strikers cut off at Cape Kennedy on the basis of NLRB jurisdiction; at FEC's southern terminus in Dade and Broward Counties, Florida, litigation has gone on since 1963 in a Florida state court, the U. S. District Court, the U. S. Court of Appeals, and the NLRB concerning the question with conflicting and indecisive results.

First, the Circuit Court in and for Broward County, Florida, a sister court to the Florida State Court below, reached a squarely conflicting result to the one reached in this case when an attempt was made in 1963 to enjoin certain picketing by the FEC striking non-operating unions of the interchange between FEC and the terminal railroad operated by the Broward County Port Authority. There, as here, the complaining railroad sought to enjoin the picketing on the ground that it was an illegal secondary boycott under Florida law. But there Florida Circuit

Court Judge Tedder dismissed the suit for lack of jurisdiction on the basis that the conduct sought to be enjoined was "arguably subject" to the jurisdiction of the NLRB; citing the *Garmon* and the *New York, New Haven & Hartford R. Co.* cases referred to above. *Broward County Port Authority* v. *Railroad Telegraphers et al.*, 54 L. R. R. M. 2228 (Fla. Cir. Ct. 1963). Thereafter, an attempt to obtain an advisory opinion from the NLRB on the question failed. *Broward County Port Authority and Order of Railroad Telegraphers et al.*, Case No. AO-64, 1963, 144 N. L. R. B. No. 115, 54 L. R. R. M. 1312.

Meanwhile, the Broward County Port Authority filed a third-party complaint under Section 303 of the Labor Management Relations Act, 29 U. S. C. 187, against the FEC non-operating unions and the BRT and the BLF&E in February, 1964, in the U. S. District Court for the Southern District of Florida. *Florida East Coast Railway Co.* v. *Broward County Port Authority* v. *Brotherhood of Locomotive Firemen & Enginemen et al.*, Case No. 63-282-Civ.-DD. A motion to dismiss the third party complaint was extensively briefed and argued to Chief Judge Dyer of that Court (now Circuit Judge Dyer) and denied. Thereafter, upon receipt of the mandate from the U. S. Court of Appeals for the Fifth Circuit in *Brotherhood of Locomotive Firemen and Enginemen* v. *Florida East Coast Ry. Co.*, 346 F. 2d 673 (5 Cir. 1965), the U. S. District Court granted a summary judgment in favor of the union third party defendants on the Section 303 claim, among others. The Broward County Port Authority, however, appealed this ruling and the case is now pending in the U. S. Court of Appeals for the Fifth Circuit, Case No. 23,199.

On the basis of the foregoing, it cannot be accurately said that "no one is willing to step forward and make such an argument" that the conduct here involved is "arguably subject" to the jurisdiction of the NLRB; and it is understandably difficult for petitioners to see how the question —which has been hotly litigated for the past five years— is not an "arguable" one. See also *Pan American World Airways, Inc.* v. *United Bro. of Carpenters & Joiners*, 324 F. 2d 217 (9 Cir. 1963), *cert. den.*, 376 U. S. 964 (1964) (Mr. Justice Douglas noted his opinion that certiorari should be granted), where it was held that the status of an airline company as an employer under the Railway Labor Act or the LMRA depends upon what functions the employer is actually doing in the specific instance involved. The NLRB, of course, has taken jurisdiction over two of the petitioners here involved in regard to a picketing dispute involving non-railroad employees. *Brotherhood of Locomotive Firemen & Enginemen and Brotherhood of Railroad Trainmen and Phelps Dodge Corp.*, 130 N. L. R. B. No. 94, 47 L. R. R. M. 1461 (1961).

For these reasons, petitioners respectfully submit that the State Courts below lacked jurisdiction to try this case, and the judgment below should be reversed with directions to dismiss the case.

V.

The Injunction of the Florida Court in This Case Violates Free Speech Rights Protected by the First and Fourteenth Amendments to the United States Constitution.

The State of Florida does not purport to ban all peaceful picketing or demonstrations on the public streets of its cities. Insofar as labor picketing is concerned, its general statute regulating labor union conduct specifically protects the "right of free petition, lawful assemblage and free speech" of any member of a labor organization[33] and by negative implication, at least, permits picketing within "the area of the industry within which a labor dispute arises."[34] Likewise the injunction in this case does not ban all picketing of respondent's premises for it excepts from its terms the so-called "reserved gate" which is posted for use of FEC employees only.

Since the "reserved gate" is only for use of direct employees of the FEC (and not for *all* of them),[35] it is plain that the intent of the injunction was to limit the persons to whom petitioners could address their plea for help ex-

---

[33] Section 447.09 (1), Florida Statutes, 1965 and 1967, 15 F. S. A. §447.09 (1), Appendix Q, p. 112a.

[34] Section 447.09 (12), F. S. 1965 and 1967, 15 F. S. A. §447.09 (12) Appendix Q, p. 112a: "It shall be unlawful for any person: * * * (12) To picket beyond the area of the industry within which a labor dispute arises."

[35] The gate is only "for the exclusive use and entrance of FEC employees who report to work on JTC premises to begin their work day." (Stipulation, paragraph 6, Record, Vol. II, pp. 124-127.) Obviously FEC employees entering the premises by rail or other vehicle must use other entrances.

clusively to those directly employed by the FEC. Petitioners respectfully submit that thereby the State of Florida is regulating not the act of picketing itself, but rather the "communication" or "speech" involved in the picketing. Indeed, respondent admitted as much in the District Court of Appeal below when it stated that the Chancellor's decree was "• • • unquestionably in regulation of speech or communications • • •."[36]

It is clear, of course, at this time that the communication of ideas by picketing or marching on the public streets does not enjoy the same degree of protection under the First and Fourteenth Amendments as is afforded to "pure speech." *Amalgamated Food Employees* v. *Logan Valley Plaza*, —— U. S. ——, 88 S. Ct. 1601, 1605-1606 (1968); *Cox* v. *Louisiana*, 379 U. S. 536, 555 (1965). As stated by Mr. Justice Marshall, writing for the Court in *Amalgamated Food Employees* v. *Logan Valley Plaza, supra*, 88 S. Ct. at 1606:

> "To be sure, this Court has noted that picketing involves elements of both speech and conduct, i.e., patrolling, and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech. See e.g., Hughes v. Superior Court of State of California in and for Contra Costa County, 339 U. S. 460 (1950); International Brotherhood of Teamsters Local 695 v. Vogt, Inc., 354 U. S. 284 (1957); Cox v. State of Louisiana, 379 U. S. 559 (1964); Cameron v. Johnson, 390 U. S.

[36] Page 44, Brief of Appellee in District Court of Appeal, First District, State of Florida. The full sentence quoted from reads as follows: "Thus the Chancellor's decree, though unquestionably in regulation of speech or communications, was not prohibited by either the United States or Florida Constitutions."

611. Nevertheless, no case decided by this Court can be found to support the proposition that the non-speech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether."

Nevertheless some lesser degree of protection is afforded as the holdings in the *Logan Valley Plaza* and *Cox* cases demonstrate.[37] In this area of First Amendment rights, at least, the courts apparently are called upon to apply a balancing test weighing the rights of the public to enjoy unimpeded use of their public thoroughfares for carrying traffic, and to pass thereon free from the reception of unwanted exhortations, on the one hand, against the rights of persons peacefully and in an orderly manner to assemble in public places and communicate ideas, on the other. This latter right, of course, is of particular importance to minority groups and to those with grievances against majority power who lack the means to publish newspapers or own television and radio stations. See Baron, *Access to Press —A New First Amendment Right*, 80 Harvard L. R. 1641.[38]

---

[37] See also dissenting opinions of Mr. Justice Black, concurred in by Mr. Justice Douglas, and of Mr. Justice Reed in *Milk Wagon Drivers U.* v. *Meadowmoor Dairies*, 312 U. S. 287, 299-321 (1941).

[38] Compare the First Amendment's counterpart in the Soviet Union's Constitution, Clause 125: "In accordance with the Worker's interests and with the aim of strengthening the Socialist system, the citizens of the U. S. S. R. are guaranteed by law: A. Freedom of speech; B. Freedom of the press; C. Freedom of gatherings and meetings; D. Freedom of processions and demonstrations on the streets. These rights of the citizens are secured by making available to workers and their organizations printing facilities, supplies of paper, public buildings, streets * * * ." This provision was recently cited by the Russian writer, Vladimir I. Bukovsky, without success, in defending himself against criminal charges of violating by a street demonstration, the Russian Law, Article 70, prohibiting "Agitation and propaganda conducted with the aim

Certainly the recent, appalling spectacle of ghetto dwellers firing their own homes and neighborhoods in a fit of frenzy resembling a frustrated child who has not yet learned to communicate adequately by speech, suggests that the problem is very much with us today, and that the balancing task facing this Court and the Nation's judicial system is not an easy one.[39]

In this case the Florida courts have struck the balance by cutting off all communication by petitioners to fellow railroad workers who are not only employed in the same industry but who actually and regularly perform labor services for the FEC (i.e., the respondent's employees), and who regularly and daily make deliveries to and from the FEC. Petitioners submit that this is not the balance required by the First and Fourteenth Amendments. As stated by this Court in *American Federation of Labor* v. *Swing*, 312 U. S. 321, 326 (1941):

> "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdepend-

---

of subverting or weakening Soviet authority * * *." Mr. Bukovsky also relied, without success, on First Amendment decisions of this Court. See translation of letter of October 3, 1967, of Pavel M. Litvinov to newspapers in the West, New York Times, December 27, 1967, p. 39.

[39] It was, of course, the firm belief of Dr. Martin Luther King, who was assassinated while preparing to ignore a federal court order barring a 6,000 man march in Memphis, that the only constructive way to bridge the communication gap in this country between the minority confined in ghettos and the more affluent majority was by public, but peaceful, demonstrations. See New York Times, April 4, 1968, p. 30.

ence of economic interest of all engaged in the same industry has become a commonplace."

For reasons stated above in a preceding section of this brief, the picketing here cannot be characterized as "secondary" under LMRA standards or under any applicable federal law criteria. Compare *Carpenters Local 213* v. *Ritter's Cafe*, 315 U. S. 722 (1942), where the picketing was carried on a mile and a half away from the place where the primary employer, a contractor who employed non-union labor, was working and at a place where the primary employer did not do business, have employees, receive or send deliveries, or otherwise operate. Thus here, as distinguished from the *Ritter's Cafe* case, the injunction has the intended effect of censoring communication to fellow workers who regularly come into direct contact with the primary employer for the purpose of providing him essential services.

The injunction here, being an admitted regulation of speech and communication,[40] cannot be reconciled with the rights guaranteed to the people under the First and Fourteenth Amendments to their Constitution.

---

[40] See note 36, *supra*.

CONCLUSION

For the reasons stated, the judgment of the Florida District Court of Appeal for the First District should be reversed, and the case should be remanded with instructions for the entry of a final judgment for the petitioners (defendants in the Circuit Court for the Fourth Judicial Circuit in and for Duval County, Florida, below) or, in the alternative, with instructions to dismiss the case for lack of jurisdiction.

Respectfully submitted,

LESTER P. SCHOENE
Schoene & Kramer
1625 K Street, N.W.
Washington, D. C. 20006

NEAL P. RUTLEDGE
601 Flagler Federal Building
111 N.E. First Street
Miami, Florida 33132
Counsel for Petitioners

August 8, 1968